DOCUMENT RESUME

ED 355 150 SO 022 972

AUTHOR	Frank, Alan; And Others
TITLE	The Bill of Rights in Nebraska. Curriculum Materials for Senior High School Students.
INSTITUTION	Bill of Rights in Nebraska Project.
SPONS AGENCY	Nebraska Committee for the Humanities.
PUB DATE	88
NOTE	410p.
PUB TYPE	Guides - Classroom Use - Teaching Guides (For Teacher) (052)
EDRS PRICE	MF01/PC17 Plus Postage.
DESCRIPTORS	*Citizenship Education; *Constitutional Law; High Schools; High School Students; Instructional Materials; *Law Related Education; Learning Activities; Social Studies; State History; Teaching Methods; United States History
IDENTIFIERS	*Bill of Rights; Nebraska

ABSTRACT

Twelve lesson plans on the Bill of Rights are featured in these materials for Nebraska senior high school students. The 12 lessons include: (1) The Bill of Rights--Introductory Unit; (2) Freedom of Speech; (3) Freedom of the Press; (4) Free Press/Fair Trial; (5) Freedom of Religion; (6) The Right to Keep and Bear Arms; (7) Due Process; (8) Search and Seizure and the Right of Privacy; (9) The Fifth Amendment; (10) The Sixth Amendment: Equal Justice Under Law; (11) The Eighth Amendment; and (12) Equal Protection. Each lesson provides an introduction, goals, objectives, activities, and media resources. A series of activities comprise the focus of each lesson. Instructions for teachers on the activities are included, as are student materials. (DB)

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THE BILL OF RIGHTS IN NEBRASKA

Curriculum Materials
for
Senior High School Students

prepared by

The Bill of Rights in Nebraska Project

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TABLE OF CONTENTS

TAB 1: The Bill of Rights--Introductory unit
TAB 2: Freedom of Speech
TAB 3: Freedom of the Press
TAB 4: Free Press/Fair Trial
TAB 5: Freedom of Religion
TAB 6: The Right to Keep and Bear Arms
TAB 7: Due Process
TAB 8: Search and Seizure and The Right of Privacy
TAB 9: The Fifth Amendment
TAB 10: The Sixth Amendment: "Equal Justice Under Law"
TAB 11: The Eighth Amendment
TAB 12: Equal Protection

We the People

THE BILL OF RIGHTS:

A Law-Related Curriculum for High School Students

Lesson 1:
The Bill of Rights

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A project of
The Bill of Rights in Nebraska

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Funding for this project is provided by a
grant from the Nebraska Committee for the
Humanities, an affiliate of the National Endowment
for the Humanities and grants from the Cooper Foundation,
the Walter Scott Jr. Foundation, the Robert Veach Foundation,
and the Winthrop and Frances Lane Foundation.

TABLE OF CONTENTS

Lesson One: The Bill of Rights

Introduction 6
Goals 8
Objectives 8
Activities 8
Media Resources 9

Teaching Instructions

Activity 1-A: Fundamental Freedoms Survey 12
Activity 1-B: A Day in the Life of James and Jane Austin 13
Activity 1-C: The Extended Bill of Rights 14
Activity 1-D: Was the Bill of Rights Necessary? 17
Activity 1-E: State Action 18
Activity 1-F: Inalienable Rights 20
Activity 1-G: Which Rights Mean the Most? 22

Student Materials

Activity 1-A: What's Your Opinion?
A Fundamental Freedoms Survey 24
Activity 1-B: A Day in the Life of James and Jane Austin 26
Activity 1-C: The Extended Bill of Rights 28
Activity 1-D: Was the Bill of Rights Necessary? 34
Activity 1-E: State Action 36
Activity 1-F: The March 40
Activity 1-G: Which Rights Mean the Most? 41

BILL OF RIGHTS

CURRICULUM EVALUATION

HIGH SCHOOL

Teacher ____________________

School ____________________

Grade ____________________

Lesson taught ________________

A. Please rate your degree of agreement/disagreement with the following statements:

	Totally Agree			Totally Agree	
1) The lesson was well suited to my students' conceptual level.	1	2	3	4	5
2) The lesson provided new information.	1	2	3	4	5
3) The lesson presented concepts and information in a better manner than do traditional texts.	1	2	3	4	5
4) The lesson meshed well with our course outline for the semester	1	2	3	4	5
5) I personally learned something from the lesson.	1	2	3	4	5
6) The materials were complete enough for good presentation.	1	2	3	4	5
7) I feel the lesson will be thought provoking for students (stimulate out of class thought & discussion).	1	2	3	4	5
8) I can pick up on the lesson in subsequent classes.	1	2	3	4	5
9) I think the lesson challenged some students' attitudes.	1	2	3	4	5
10) The lesson incorporated, built upon material we have already covered.	1	2	3	4	5
11) I was able to use the lesson *as is*.	1	2	3	4	5
12) I *adapted* the lesson in my presentation.	1	2	3	4	5
13) I would consider using more such materials in my classes.	1	2	3	4	5
14) I feel the materials are deficient in some way.	1	2	3	4	5

Please respond to the questions on the next page also.

Mail completed form to:
Alan Frank, University of Nebraska, College of Law, Lincoln, NE 68583-0902

B. Please answer the following:

1) Describe students' reaction/participation to this lesson:

2) What do you consider the best point of this lesson/activity?

3) What suggestions do you have for adapting or modifying this lesson/activity?

4) Were the materials adequate? How could they be improved?

Lesson 1

BILL OF RIGHTS

We the People

INTRODUCTION

This lesson introduces the student to the Bill of Rights and to the concept of "rights". A right is defined by the dictionary as "that which a person has a just claim to; power, privilege, etc. that belong to a person by law, nature, or tradition: as, it was his right to say what he thought." Unlike ordinary privileges, rights are not favors given to people by a higher authority, which can take them away as easily as it bestowed them (like the privilege to drive a car or to stay out until 1 a.m.). Unlike laws and rules, rights are not codes of conduct, telling us what we can or cannot do, which can easily be changed or repealed (like no skipping classes or no driving faster than 65 miles per hour).

The Bill of Rights and subsequent constitutional amendments (which together we refer to as the extended Bill of Rights) are a guarantee of Americans' basic rights. These basic rights can be divided into three categories: (1) **liberty** — such as freedom of speech and religion, (2) **justice** — such as the right to a fair trial, and (3) **equality** — such as the right to equal protection of the laws.

The Bill of Rights was added to the Constitution as a guarantee that the new national government, albeit a government of limited powers, would not trample on the rights of the people. Accordingly, the Bill of Rights was directed to actions of the *federal* government. Thus the First Amendment reads:

> **CONGRESS** shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the government for a redress of grievances.

The Civil War was the major battle in the fight between the concepts of a strong national government and states' rights. In its aftermath the 14th Amendment was added to the Constitution. This amendment contains restrictions on the power of state and local governments. In particular, the amendment requires the states to guarantee their citizens equal protection of the laws and compels them not to deprive their citizens of life, liberty, or property without due process of law. The courts have interpreted the 14th Amendment's due process clause to mean that state and local governments must also guarantee the people many of the fundamental rights contained in the Bill of Rights.

Today, then, the Bill of Rights protects the people against abusive governmental action — federal, state, and local. This is the point of Activity 1-E. *The Bill of Rights applies to government action, not the actions of individuals or corporations engaged in non-governmental activities.* (An exception is the 13th Amendment. It is a constitutional violation for anyone to enslave another.) While, for instance, it is unconstitutional for government to discriminate on the basis of race, it is not unconstitutional for a private business to discriminate on the basis of race, but it may be (and probably is) a violation of federal, state, or local law.

In addition to the protections afforded by the federal Constitution, state constitutions often contain their own provisions to protect the people against potential state and local government abuse.

Although our basic rights are enshrined in a document written by men — the Bill of Rights — we regard them as fundamental concepts which humankind can neither bestow nor deny. Thus the authors of the Declaration of Independence believed that people "are endowed by their creator with certain unalienable rights."

Since they are inalienable, our rights cannot be taken away — at least not easily. This is the lesson of Activity 1-F. *The Bill of Rights protects individuals even when a majority of the people might want to deprive them of their rights.* For instance, it protects religious and racial minorities, persons with unpopular political ideas, and persons accused of a crime. Even though those convicted of crimes lose some rights, they retain many others, such as the right not to be cruelly punished.

More information on some of the topics covered in this lesson can be found in the chapter, "The Bill of Rights: An Introduction" in *A Non-Lawyers Guide to the Bill of Rights*, prepared by the Bill of Rights in Nebraska Project.

GOAL

To understand how the Bill of Rights affects Americans' daily lives by protecting fundamental freedoms.

OBJECTIVES

As a result of this lesson, students will be able to:

1. Recognize their attitudes on selected Bill of Rights issues *(Activity 1-A)*.
2. Identify the fundamental freedoms protected by the Bill of Rights and the specific amendments that protect each right. *(Activities 1-B, 1-C)*.
3. Examine the historical debate regarding the need to add a bill of rights to the United States Constitution *(Activity 1-D)*.
4. Recognize that the Bill of Rights protects Americans against government infringement of their basic rights *(Activity 1- E)*.
5. Recognize that the Bill of Rights protects the rights of minorities from abuse by the majority *(Activity 1-F)*.
6. Analyze whether the extended Bill of Rights adequately protects the rights of Americans today *(Activity 1-G)*.

ACTIVITIES

		Teaching Instructions	Student Materials
Activity 1-A.	What's Your Opinion? A Fundamental Freedoms Survey	12	24
Activity 1-B.	A Day in Life of James and Jane Austin	13	26
Activity 1-C.	The Extended Bill of Rights	14	28
Activity 1-D.	Was the Bill of Rights Necessary? (enrichment)	17	34
Activity 1-E.	State Action	18	36
Activity 1-F.	The March	20	40
Activity 1-G.	Which Rights Mean the Most (enrichment)	22	41

MEDIA RESOURCES

AMERICAN REVOLUTION—THE POSTWAR PERIOD
This film follows the major events leading to the formation of the United States and the development of the Constitution. From the *American Revolution* series, Coronet Instructional Films, 1975, 11 minutes, color.

INVENTING A NATION
In 1787 prominent citizens met in Philadelphia to develop a framework for governing the nation. The film dramatizes the secret debates among Hamilton, Mason, and Madison, and shows the contributions made by each to the final form and adoption of the Constitution. From *America: A Personal History of the United States* series, Time-Life Films, 1972, 30 minutes, color.

GEORGE MASON: PROFILE IN COURAGE
The author of Virginia's Declaration of Rights refuses to sign the federal Constitution because it lacks a Bill of Rights protecting individuals against abuse by the government. His stand threatens his career in politically aristocratic Virginia. Stars Laurence Naismith. From *Profiles in Courage* series, Zenger, videotape, 50 minutes, black & white.

TO FORM A MORE PERFECT UNION
Depicts the struggle waged by the Federalists and the Anti- federalists over ratifying the Constitution. Highlights Samuel Adams' and John Hancock's roles in ensuring ratification by the Massachusetts Convention. From *Decades of Decision: The American Revolution* series, National Geographic Society, 1974, 30 minutes, color.

THE U.S. CONSTITUTION IN ACTION
This comprehensive program explores the history and interpretation of the Constitution. The first four filmstrips trace the story of the Constitution, from how it came to be drafted through the last amendment passed in 1966. The rest of the program is devoted to "The Living Document," discussing applications of the Constitution from *Marbury v. Madison* to the call for a new Constitutional Convention. The eight filmstrips are: (1)Developing a Constitution, (2)Constitution of 1787, (3)Bill of Rights, (4)The Other Amendments, (5)Leading Constitutional Decisions: Fed. Govt. & States, (6)Leading Constitutional Decisions: The Individual, (7)Interpreting the Constitution: Continuing Controversy, (8)The Constitution: Two Centuries Later. Random House Media, sound filmstrips, color.

STATE ACTION
An inquiry-oriented program designed to involve students in the actual decision-making process of the Supreme Court. This filmstrip dramatizes an actual case involving the concept of state action. The class is invited to interpret the case before hearing the actual Supreme Court verdict. Through actual involvement with the issues, students acquire an awareness of the variable and interpretive nature of the law. From *Constitutional Law In Action* series, New York Times, sound filmstrip, color.

THE UNITED STATES SUPREME COURT: GUARDIAN OF THE CONSTITUTION
The continuing evolution of the Supreme Court is traced through historical highlights and landmark cases and through the insights of several prominent authorities commenting on the judicial viewpoint and the power of judicial review. Concept Films, 1973, 24 minutes, color.

THE BILL OF RIGHTS: FOUNDATION OF OUR LIBERTIES

The historical origins of the Bill of Rights — its guarantees, adaptability through the amendment process, and influence on our daily lives — are considered in this program. A detailed overview examines each amendment, follows the history of federal enforcement, and reviews a Supreme Court decision involving local rights vs.regional rights. Then students are given the opportunity to apply the principles set forth in this document to specific cases. Guidance Associates, sound filmstrip, color.

JUSTICE BLACK AND THE BILL OF RIGHTS

Supreme Court Justice Black explains his views on interpreting the Constitution, freedom of speech, freedom of assembly, and the rights of the accused. He also answers reporters' questions on the philosophy of the Bill of Rights in relation to current issues of law, morality, freedom of speech, and civil rights. Columbia Broadcasting System; BFA Educational Media, 1968, 32 minutes, color.

THE AMENDMENTS

From the Bill of Rights to the 26th Amendment which lowered the voting age to 18, amendments to the Constitution have not only adjusted the mechanics of government, but have also worked to protect the freedoms fundamental to the American way of life. This program surveys these amendments, examines the process by which they became the law of the land, and profiles their impact on society. From *Focus on the Constitution* series, Coronet Instructional Films, 1986, 19 minutes, color.

HUMAN RIGHTS

How do different nations perceive individual rights? This Special Report approaches the concept of human rights from a global perspective, providing viewpoints from different governments. Students will discover which governments consider capital punishment, majority rule, civil disobedience, and religious freedom to be "human rights." The program examines the place of human rights in U.S. foreign policy and provides insights by Andrew Young, former U.S. Ambassador to the United Nations, and exiled Soviet physicist Pavel Litvinov. AP Special Report, sound filmstrip, color.

We the People

TEACHING INSTRUCTIONS

Activity 1-A:

Fundamental Freedoms Survey

Purpose: To introduce students to the Bill of Rights by surveying their attitudes on Bill of Rights issues and to provide students with a means of comparing their positions on Bill of Rights issues before and after studying the unit.

Student Materials: "What's your opinion? A Fundamental Freedom Survey," pp 20-22.

Directions:

1. Assign the students to indicate their agreement or disagreement with the statements made on the survey form. In addition to writing their answers, students can be asked to indicate their positions by raising their hands, marking a continuum on the chalkboard, or lining up with their classmates at various points in the room.

2. Ask the students to share and discuss their responses.

3. Give the survey again when the class has finished studying the Bill of Rights unit and determine whether student attitudes have changed.

Enrichment Activity: Assign students to administer the survey to people not in the class, such as fellow students, parents, families, teachers, or a random sample of people on the street.

Activity 1-B:

A Day in this Life of James and Jane Justin

Purpose: To assist students in recognizing fundamental freedoms and understanding why they are important.

Student Materials: "A Day in the Life of James and Jane Justin" reading and worksheet, pp. 23-26.

Directions:

1. Instruct the students to read the story, "A Day in the Life of James and Jane Justin."

2. Divide the students into small groups and ask each group to compile a list on the worksheet entitled "Fundamental Rights Denied James and Jane Justin." On the worksheet the students should (a) identify each action by the guards or supervisor that denied the Justins the basic freedoms that are the rights of all free individuals and (b) briefly describe each freedom that is being denied. The third column — constitutional right — is to be completed as part of Activity 1-C.

3. In comparing the lists compiled by the various groups, ask the students to explain why they believe the particular freedom involved is an important one.

Activity 1-C:
The Extended Bill of Rights

Purpose: To provide students with a basic understanding of the important provisions of the Bill of Rights.

Student Materials: "The Extended Bill of Rights" text and problems, pp. 27-34.

Directions:

1. Assign the class to read the extended Bill of Rights as they work through Problem A, pp. 30-32. The fact situations are designed to assist the students in understanding the meaning of the constitutional provisions they are reading. The correct answers are:

1. No — establishment of religion (1st Amend.)

2. No — free exercise of religion (1st Amend.)

3. No — freedom of speech (1st Amend.)

4. No — freedom of the press (1st Amend.)

5. Yes — although the Constitution says Congress shall make no law abridging the right of the people peaceably to assemble, here the rule was not made by Congress, but by a private entity — The Korner Store. (1st. Amend.) (More on this in Activity 1-E.)

6. No — right to petition for redress of grievances (1st Amend.)

7. No — right to keep and bear arms (2nd Amend.)

8.No — quartering of soldiers (3rd Amend.)

9. Yes — the Bill of Rights prohibits unreasonable searches and seizures; under the facts here Sally's arrest and the seizure of the sweater seem reasonable. (4th Amend.)

10. No — search warrant must particularly describe the place to be searched and the things to be seized. (4th Amend.)

11. No — no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or indictment of a Grand Jury. (5th Amend.)

12. No — double jeopardy (5th Amend.)

13. No — self-incrimination (5th Amend.)

14. No — deprivation of life without due process of law (5th Amend.)

15. Yes — this is a taking of property for public use with just compensation. (5th Amend.)

16. Yes — although Betty did not get a speedy trial, a public trial, a jury trial, nor a trial in the district where the crime was committed (6th Amend.), all this was of her own making and not imposed upon her by the government. (The closing of the trial might be a violation of the public's and the press' 1st Amendments rights, however — see Lesson 4.)

17. No — right to be informed of the nature and cause of the accusation (6th Amend.)

18. No — right to be confronted with witnesses against her (6th Amend.)

19. No — right to obtain witnesses in his favor (6th Amend.)

20. No — right to assistance of counsel for his defense (6th Amend.)

21. No — right to trial by jury in civil cases (7th Amend.)

22. No — excessive bail shall not be required (8th Amend.)

23. No — cruel and unusual punishment (8th Amend.)

24. Yes — although the Constitution does not clearly mention a general right of privacy, the people retain rights that are not enumerated in the Constitution. (9th Amend.)

25. No — powers not delegated to the U.S. nor prohibited to the States are reserved to the States (10th Amend.)

26. No — slavery abolished (even if government action is not involved) (13th Amend.)

27. No — persons born or naturalized in the U.S. are automatically citizens of the state in which they reside (14th Amend.)

28. No — deprivation of property without due process of law (14th Amend.)

29. No — equal protection (14th Amend.)

30. No — equal protection (separate is inherently unequal) (14th Amend.)

31. Yes — equal protection does not mean that people cannot be treated differently if there is an adequate reason for the different treatment. (14th Amend.)

32. No — denial of right to vote because of race (15th Amend.), sex (19th Amend.), age (26th Amend.), and failure to pay poll tax (24th Amend.)

An alternative approach would be to cut out each of the fact situations, mix them up, and have the students discuss them in small groups. A game could be played in which points are awarded for a correct answer and subtracted for a wrong answer.

2. Assign the students **Problem B**, p. 33, the vocabulary matching exercise. The correct answers are:

1 - e
2 - i
3 - d
4 - h
5 - g
6 - m
7 - a
8 - b
9 - l
10 - o
11 - n
12 - t
13 - k
14 - s
15 - q
16 - c
17 - p
18 - r
19 - j
20 - f

3. Ask the students to do **Problem C**, p. 34, in which they are to complete the worksheet from the prior activity by writing in the last column those rights in the extended Bill of Rights which would have protected James and Jane Justin had the events in the story taken place in this country.

Activity 1-D:
Was the Bill of Rights Necessary?

AN ENRICHMENT ACTIVITY.

Purpose: To acquaint students with some of the arguments for and against adding the Bill of Rights to the U.S. Constitution.

Student Materials: "Was the Bill of Rights Necessary?" text and questions, pp. 35-37.

Directions: Assign the students to read the text and answer the questions. If desired, a mock legislative hearing could be set up in which citizens testify before a committee of the First Congress about their views on amending the Constitution to add a bill of rights.

Activity 1-E:
State Action

Purpose: To point out that the Bill of Rights protects people against governmental infringement of their rights and to introduce students to the concept of state action.

Student Materials: "State Action" reading and questions, pp. 38- 45.

Directions:

1. Assign the students to read the textual material up to the first set of questions on page 41. If preferred, a lecture can be substituted. The main points that students should glean from the reading are that (a) the Bill of Rights protects people primarily against *governmental* infringement of their rights and not against abuses of private persons and entities and (b) governmental infringement means the abuse of power by *local, state,* and the *federal* government, as well as by the people who act for government.

2. Discuss the state action hypotheticals on pages 41-42. The answers are:

1. Yes
2. Yes
3. No
4. Yes
5. No
6. No
7. Yes
8. Yes
9. No
10. Yes
11. Yes
12. No

Note that although in *number 12* the state social services counselor is a state employee, she is *not* doing her job (operating in her official capacity) when she quiets her neighbors' children's political discussion.

Enrichment Exercise: The material titled "The Borderline Between State Action and Private Action" beginning on page 42 explores a complicated concept and is intended only for classes where in- depth study is desired. A half-way approach between skipping this material entirely and a full discussion of it would be to assign the class to simply read over the text and questions to alert the students to the kind of situations that lie in the gray area between government and non-government action, without attempting to resolve the issues.

For teachers who wish to delve into this material, the following analysis of the questions on pages 43-45 should assist in class discussion:

1. The gift shop is operated by a private company and thus is not technically a state actor. It receives no direct aid from the government. On the other hand, the gift shop benefits from its location within the government facility and its location and status as a lessee of the government gives the appearance of government authorization of its practices. Likewise, the state benefits from the rental monies received. The state had the power to require in the lease that the gift shop not discriminate, but it chose not to do so.

In *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), the U.S. Supreme Court said that a privately-owned restaurant which leased space in a government parking facility violated the equal protection clause of the Constitution when it refused service to members of racial minorities. The Court concluded that when the activities of the government and the private actor became so intertwined for their mutual benefit, the private party has no complaint when he or she is subjected to constitutional limits in the same manner as the government.

2. The issue here is whether the modern shopping mall has so taken over the functions of a public downtown shopping area that it can be said to perform a traditional government function of providing forums for effective communication. Those who believe that this is equivalent to state action can argue that the owner of a modern shopping center complex, by dedicating his or her property to public use as a business district, to some extent displaces the state from control of historical First Amendment forums and may acquire a virtual monopoly of places suitable for effective communication — the roadways, parking lots, and walkways of the modern shopping center. In *Marsh v. Alabama*, 326 U.S. 501 (1946), the Supreme Court held that a "company town" which had all the attributes of a state-created municipality — including businesses, residences, sewer lines, streets, and post offices — was performing typical governmental functions and was subject to the limitations of the First Amendment.

Those who believe that the First Amendment ought not apply can point out the differences between the complete taking over of municipal responsibilities in the case of a company town and the limited functions of a shopping mall. The protestors could hold their demonstrations in many other places, including downtown Grand Island and the public roads leading to the shopping center. The shopping center is private property and the right of ownership of private property includes the right to exclude others. In *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), and *Hudgens v. NLRB*, 424 U.S. 507 (1976), the Supreme Court held that shopping center owners were not government actors. The Court said only where property is used as a city does it lose its private character.

3. Those who see state action here can argue that the liquor license, police and fire protection, and tax exemptions given the lodge amount to direct government aid to the private club, making its activities state action. Others can argue that these are not sufficient to constitute state action or to overcome the right of private individuals to associate with whom they please.

Court decisions have made it clear that the receiving of generalized government services, such as police or fire protection, does not make the recipients state actors. However, clubs that discriminate are not able to receive any specialized benefits that would be the equivalent of government support of their racially restrictive practices.

The U.S. Supreme Court in a 5-4 decision, *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), held that the mere issuance of a liquor license was not such a specialized benefit, even though the city issued only a limited number of licenses. Lower federal courts have held that the equal protection clause prohibits the government from giving specialized tax exemptions to fraternal organizations that discriminate. They have said that such tax exemptions encourage private support of activities in which the state has a vital interest and give the clubs a fiscal freedom they would not otherwise enjoy. See, e.g., Falkenstein v. Dept. of Revenue, 350 F. Supp. 887 (D. Or. 1972), appeal dismissed 409 U.S. 1099 (1973).

Note: On a related issue, the U.S. Supreme Court has held that state laws prohibiting race or sex discrimination by at least some private organizations are valid and do not violate the First Amendment's protection of the freedom of association. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 107 S.Ct. 1940 (1987); *New York State Club Association v. City of New York*, 108 S.Ct. xxx (1988).

4. Clearly the seller of the land and his neighbors are private individuals not subject to the equal protection clause. However, the U.S. Supreme Court has held that since some of the neighbors asked the courts to enforce the agreement, the involvement of the courts constitutes government-related or state action. A court order upholding the agreement would be a judicial command to the landowner to make a racial distinction in the sale of property, which would violate the equal protection clause. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

Activity 1-F:
Inalienable Rights

Purpose: To demonstrate that the Bill of Rights protects the rights of minorities from abuse by the majority.

Student Materials: "The March" hypothetical and questions, pp. 46-47.

Directions:

1. Direct the students to read the hypothetical and to think about the first question.

2. Lead a class discussion about their answers. While in a democracy we hold sacred the concept that the majority rules, isn't the Bill of Rights designed to protect minority rights from being crushed by the power of the majority? Even in a democracy, must the majority not be subject to limits that assure individual liberty? Do ideas which are popular and widely accepted need the protection of the First Amendment, or are unpopular viewpoints the ones most likely to be infringed upon by government? Should the majority be able to vote to send the members of the "Sons of Liberty" to jail or to have them put to death?

In a case concerning the constitutionality of the cancelling of a showing of the controversial film Hail Mary on the University of Nebraska - Lincoln campus, Federal District Judge Warren Urbom made this observation:

> [A] petition signed by many people has come to my office. It is not in evidence and I have no reason to think that any of the attorneys or parties know of it. I have made a point of not counting the names or seeing whether I know any of them. Lawsuits are not matters for resolution by petition. It is the Constitution that must govern the disposition of this case and no vote of the people can affect a right guaranteed by it, unless it is one amending the Constitution itself.

Brown v. Board of Regents of University of Nebraska, 640 F. Supp. 674, 682 (D. Neb. 1986).

A case somewhat similar to the one in the hypothetical was the attempt by American Nazis to hold a march in Skokie, Illinois over the vociferous protests of the citizens of that Chicago suburb, some of whom had been victims of Nazi oppression in Europe. The Seventh Circuit Court of Appeals held that the attempts to prevent the march violated the First Amendment. *Collin v. Smith*, 578 F. 2d 1197 (7th Cir. 1978) *cert. denied*, 439 U.S. 916 (1978). The trial court judge wrote that constitutional protection is needed, not for the expression of thoughts with which we agree, but for those we hate. The danger arises, the court believed, when due to our hatred for some views, we allow the government to decide what citizens say and hear. *Collin v. Smith*, 447 F. Supp. 676, (N.D. Ill., 1978).

3. Assign the students to write an essay answering the second question — What do you believe a "right" is as that term applies to the rights guaranteed by the Bill of Rights? The question asks the students to draw general principles from the information about rights and the Bill of Rights that has been covered thus far.

Student responses should contain some of the following ideas: Rights are basic and fundamental to a free society; rights protect human dignity; rights cannot be easily taken away; rights protect minorities from the abuse of power of the majority; rights protect us from the abuse of government power; rights are different from privileges, laws, and rules.

If the students have difficulty distinguishing rights, privileges, and rules give them the following simple definitions:

Rights — basic, fundamental freedoms that belong to each individual in a free society.

Privileges — favors given people by a higher authority; often they are earned, but they do not have to be; they can be taken away fairly easily.

Rules — codes of conduct telling us what we can or cannot do; they can be easily changed or repealed; a law is a kind of rule.

Ask the students to categorize the following as rights, privileges, or rules:

1. Drive a car
2. No hard shoes on the gym floor
3. Talk about our ideas freely and openly
4. Attend public school
5. Participate in after-school sports
6. Worship God
7. No fishing
8. No talking without raising hands
9. Peacefully meet with friends
10. Be home from a date by midnight
11. Receive equal treatment under the law

Activity 1-G:
Which Rights Mean the Most?

AN ENRICHMENT ACTIVITY

Purpose: To raise the question whether the extended Bill of Rights adequately protects the rights of Americans today.

Student Materials: "Which Rights Mean Most?" editorial and question, p. 48.

Comments:

1. This activity gives the students an opportunity to express their views about the Bill of Rights. The Nicholas von Hoffman column not only implies that the Bill of Rights should be expanded to include basic economic rights, it also asks whether, for many Americans, these economic rights are not more important than the political rights espoused by the Bill of Rights. Do the students agree? More importantly, can they explain why they do or do not agree?

2. For one answer to the question raised by the column see "Education for Democracy: A Statement of Principles," *American Educator*, Summer 1987, p. 13:

> [T]he "rights" to food and work and medical care, when separated from the rights to free speech, a free press, and free elections, are not rights at all. They are rewards from the government that are easily bestowed and just as easily betrayed.

3. If these materials are being used as a basis for a course on the Bill of Rights, this activity might be an appropriate concluding task for the course.

We the People

STUDENT MATERIALS

Activity 1-A

What's Your Opinion?
A Fundamental Freedoms Survey

Read each of the statements below. Then choose the letter that best expresses your opinion about the statement. Use the following code:

SA = strongly agree A = Agree U = Undecided D = Disagree SD = Strongly Disagree

______1.The Bill of Rights protects the rights of minorities and those with unpopular viewpoints from abuse by the majority.

______2.People who insult the President of the United States should be arrested.

______3.A protest march or parade should be allowed in a community even though a majority of the people who live there disapprove of it.

______4.It should be illegal to join potentially dangerous groups like the Communist Party, the Ku Klux Klan, and the Posse Comitatus.

______5.Books and magazines that the government believes are dangerous should not be published.

______6.If a radio or television station presents slanted news stories, the government should be able to cancel its license.

______7.Negative or embarrassing things about the school should not be printed in a school newspaper.

______8.If a newspaper prints a story falsely accusing a government official of illegal behavior, the newspaper should have to pay the official for the damage to his or her reputation.

______9.In order to protect potential jurors from prejudicial pre-trial publicity, judges should be able to order newspapers and television and radio stations not to print or broadcast certain information.

______10.If a newspaper reporter learns about drug selling activity from a confidential source, the reporter should be required to reveal the identity of the source when asked by the appropriate officials.

______11.Television should be allowed to broadcast criminal trials.

______12.If the Future Farmers of America, the Letter Club, and the Chess Club are allowed to meet in a public school before or after classes, the Bible Study and Prayer Group should also be able to meet.

______13.Public school teachers should set aside a few minutes each morning for students to engage in voluntary prayer or meditation.

______14.Parochial schools should receive federal and state funds to pay for all educational costs except those related to religious instruction.

______15.When public school activities (such as the reading of certain stories or the watching of video tapes) violate the religious belief of a particular student, the school should be required to provide alternate activities for that student.

______16.All competent adults should have the right to own a handgun.

______17.People accused of crimes have too many rights.

______18.People who are arrested for crimes should have to prove they did not commit them.

______19.Police officers should be permitted to search a car thoroughly when the driver is stopped for a traffic violation.

______20.In order to fight crime, police should be able to use freely electronic listening equipment, telephone wiretaps, and hidden cameras.

______21.People suspected or accused of crimes should not have to answer questions from police or other authorities.

______22.If police obtain evidence illegally from a person suspected of a crime, it should not be admitted in court as evidence against the suspect.

______23.If a person accused of a crime cannot afford a lawyer, the taxpayers' money should be used to provide him or her with one.

______24.Persons accused of violent crimes should be held in jail without bail until their trial.

______25.Persons charged with serious crimes should be tried by judges, not juries.

______26.The death penalty is cruel and unusual punishment and should be abolished.

______27.Children who come from non-English speaking families should be forbidden to speak any language except English in public schools.

______28.Students should never be bused for the purpose of ending racial segregation in the public schools.

______29.When workers are being laid off their jobs because of a lack of work, women should be the first to be fired.

______30.Race should never be a factor when the government decides to hire someone.

Activity 1-B

A Day in the Life of James and Jane Justin

Two young adults, James and Jane Justin, arrive in the nation of Tyranny on a rainy Friday morning. A road sign warns, **"Entering the State of Submission, United States of Tyranny. Warning: All Persons Entering Must Obey Tyranny's Authority — Violators Will Be Punished."**

The Justins stop their camper at a checkpoint where National Guard troops are stationed. The Justins notice that security cameras are aimed at their camper. The guards are well-armed with what appear to be automatic rifles.

One of the guardsmen asks the Justins for identification. The guard also asks them to step out of their camper and give the keys to another guard standing by. The guard reviews their driver's licenses, and then, without returning them, tells them to step inside the National Guard headquarters. The guard with the keys has opened the rear door of the Justins' camper and has removed their luggage. The guard also has set a magazine and newspaper aside that were taken from inside the vehicle.

Meanwhile, James and Jane have been separated — James is taken into a room by a male guard and Jane into a different room by a female guard. Both James and Jane are searched. Afterwards, they are told to report to the main office of the National Guard headquarters. Upon entering the main office, the Justins observe a pile containing some of their t-shirts, some books, a religious pamphlet, a daily newspaper, and a hunting rifle. A supervisor of the guards informs the Justins that these materials are being confiscated by Tyranny because they are subversive.

As an example, the supervisor holds up a t-shirt from the luggage that has a large question mark in the center with the words "QUESTION AUTHORITY" printed under the question mark. The supervisor says such expressions are not permitted in Tyranny, and that the other items confiscated were not on the approved reading list of the Ministry of Information. The religious pamphlet is also confiscated because in Tyranny the only permissible religion is the official state religion. The rifle is taken because no one except official authorities can have weapons in Tyranny. When Jane protests, she is pushed onto a chair by a guard and the supervisor tells her that she must be quiet and learn to obey authority.

The supervisor calls in two other guards and tells them to place the Justins in separate detention rooms until a more thorough investigation can be done. The Justins protest, asking why they are being detained and demanding the right to call an attorney or someone else to help them. The supervisor smiles and replies, "We are here to help you. You do not need anyone else."

The Justins are held in isolation for hours. They are permitted no food, no sanitary facilities, and no communication with anyone. Meanwhile, the National Guard officers confiscate the Justins' camper. The officers eat food and drink beverages from the refrigerator and sleep in the bunks. The Justins journey into Tyranny has become a nightmare.

Activity 1-B

Worksheet Fundamental Freedoms Denied
James and Jane Justin

Actions that denied basic rights	Right being denied	Constitutional right

Activity 1-C

The Extended Bill of Rights of the Constitution of the United States

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.

Amendment III

No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XIII

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Amendment XXIV
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment XV

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Amendment XIX

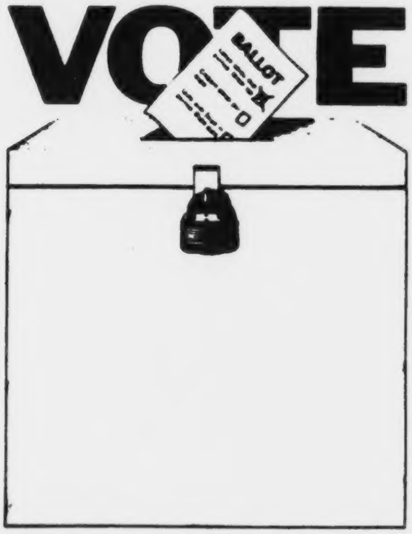
The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Amendment XXIV

The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

Amendment XXVI

The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or any state on account of age.



Problems

A. Using your copy of the extended Bill of Rights, decide whether the Bill of Rights permits the actions described below. Be prepared to explain what rights in the Bill of Rights each of the action affects.

1. Congress passes a law that makes Christianity the official religion of the United States. yes no

2. Congress passes a law requiring all religious services to be held on Sundays and on no other day. yes no

3. Congress passes a law that says that no one can criticize the President of the United States. yes no

4. Congress passes a law that says that a newspaper must print at least one "positive" story on its front pages. yes no

5. The Korner Store prohibits no more than four students of junior high age from being in the store at the same time. yes no

6. Congress passes a law prohibiting people from asking the government to change a policy that harms them. yes no

7. Congress passes a law abolishing the National Guard and allowing only people in the U.S. Armed Forces to have guns. yes no

8. The President sends the Army to help an area ravaged by floods. He says that the residents of the area will have to feed the soldiers and let them sleep in their homes. yes no

9. A police officer sees Sally shoplift a sweater in a store. He arrests her and takes the sweater. yes no

10. A police officer has good reason to believe that Joe has committed a crime. He gets a search warrant (a document which authorizes him to search for and seize evidence that could prove who committed a crime) allowing him to search any place where Joe might live and take any evidence of criminal activity he might find. yes no

11. Frank is tried and found guilty of kidnapping in federal court. His case was never brought before a grand jury to allow the jury to decide whether there is enough evidence to try Frank for the crime. yes no

12. Emily is tried for kidnapping and found not guilty. She is tried again before a different jury and found guilty and is sent to prison. yes no

13. The police torture Jesse until he confesses that he is guilty of kidnapping Jane. The confession is used at Jesse's trial. He is found guilty and sent to prison. yes no

14. The commanding officer of Jackson's army unit accuses him of cowardice during battle. He immediately has Jackson shot by a firing squad. yes no

15. The U.S. government wants Ramona's property in order to build a federal courthouse on it. After a hearing, the government pays Ramona what the property is worth and orders her to leave. yes no

16. Betty is accused of armed robbery. Her lawyer delays the trial so that she is not tried until two years later. Her lawyer also requests that the trial be held in another part of the state, that the trial be closed to the public, and that it be tried before a judge rather than a jury. The requests are granted. yes no

17. Sam is tried for being a criminal and found guilty. He is never told what crime he is accused of committing. yes no

18. Jo Ann is tried for stealing a car. The only evidence against her is a written statement from Brenda saying that Brenda saw Jo Ann take the car. Brenda is not in court. yes no

19. Richard is on trial for murder. He is not allowed to call witnesses for his defense. yes no

20. Victor has no money to pay for a lawyer. The judge tells him that unless he can find a lawyer who is willing to defend him for free, he will have to stand trial for murder without a lawyer to defend him. yes no

21. Rachel sues Amanda in federal court for $50,000 for the injuries Rachel suffered when the car Amanda was driving hit her car. Although Rachel requests a jury trial, the judge says she will decide the case herself without a jury. yes no

22. Because too many accused criminals out on bail awaiting trial commit other crimes, Congress passes a law prohibiting judges from setting bail. yes no

23. For stealing a bag of rice, Eleanor's hand is cut off by government officials. yes no

24. The Supreme Court says people have the right of privacy. yes no

25. Congress passes a law that says that state governments cannot tax their citizens. yes no

26. Fred is found in the street by Ralph and Lillian. They bring him to their farm where they force him to work without pay. yes no

27. The State of Nebraska passes a law that says that in order to be a citizen of Nebraska, residents of the state have to pass a written test on Nebraska history. yes no

28. The State of Nebraska puts a bike path through the middle of Sarah's yard. She is not paid and not provided an opportunity to argue against it. yes no

29. The State of Nebraska passes a law that says that all high school teachers must be males. yes no

30. The State of Nebraska passes a law that says that all black children must attend schools separate from white children. yes no

31. The State of Nebraska passes a law that says that only high school students who do passing work may participate in extra-curricular activities. yes no

32. Julia is not allowed to vote in the election for U.S. Senator because she is black, a woman, only 18 years old, and unable to pay the $5.00 poll tax. yes no

B Match the vocabulary words used in the expanded Bill of Rights in column one with the definition in column two.

Column One

1. abridging
2. redress
3. militia
4. infringed
5. quartered
6. capital crime
7. indictment
8. jeopardy
9. due process
10. compulsory
11. compensation
12. enumeration
13. disparage
14. bail
15. delegated
16. effects
17. immunity
18. construed
19. servitude
20. poll tax

Column Two

a. formal charge, accusation
b. danger
c. possessions
d. military service
e. limiting or reducing
f. fee paid in order to vote
g. housed
h. trespassed upon
i. set right a wrong
j. slavery
k. run down, discredit
l. fair procedures
m. most serious, fatal
n. payment
o. required
p. freedom or release from an obligation
q. assigned to another
r. interpreted
s. money given in exchange for releas pending trial
t. list

C Review "A Day in the Life of James and Jane Justin" on pages 23-25 of this lesson. Using the worksheet on page 26, determine which rights in the extended Bill of Rights protect Americans from the denial of basic freedoms that the Justins suffered in the State of Submission, United States of Tyranny.

Activity 1-D

Was the Bill of Rights Necessary?

The Bill of Rights was not in the original Constitution. It was proposed at the Constitutional Convention, but was rejected by a majority of delegates. However, during the debate over the ratification of the new Constitution by the states, the proponents of the Bill of Rights resurrected their demand for inclusion — this time as amendments to the Constitution.

Many of the state conventions considering ratification of the Constitution discussed the need for a Bill of Rights. Many citizens feared that the new federal government created by the Constitution would be too powerful and could abuse individual liberties. Five states requested that the First Congress develop and propose a Bill of Rights to protect against the federal government's abuse of power. A total of 186 amendments were submitted to the First Congress to consider for inclusion in a Bill of Rights. One historian, Forrest McDonald, has provided the following summary of these proposed amendments:

> Seven States spoke for jury trials, six called for an increase in the number of members of Congress, protection of religious freedom, and a prohibition of standing armies in times of peace. Five wanted prohibitions against quartering troops and against unreasonable searches and seizures, and protection of the right of the states to control the militias, the rights of the people to bear arms, and the rights of freedom of speech and of the press. Four states requested guarantees of due process of law, speedy and public trials, the rights of assembly and petition, limits on the federal judicial power, and a ban on monopolies, excessive bail, unconstitutional treaties and the holding of other federal office by members of Congress.

Forrest McDonald, *The Formation of the American Republic, 1776- 1790,* Penguin Books, Baltimore, 1965, pp. 233-4.

Strong opinions for and against adding these proposed Bill of Rights were expressed throughout the new nation. The following represent some of those views:

> I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power. They might urge with a semblance of reason, that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provisions against restraining the liberty of the press afforded a clear implication, that a power to prescribe proper regulations concerning it was intended to be vested in the national government.

Alexander Hamilton, *The Federalist*, No. 84, p. 559, (New York: 1937).

> There have been objections of various kinds made against the Constitution. Some were levelled against its structure because the President was without a council; because the Senate, which is a legislative body, had judicial powers in trials on impeachments; and because the powers of that body were compounded in other respects, in a manner that did not correspond with a particular theory; because it grants more power than is supposed to be necessary for every good purpose, and controls the ordinary powers of the State Governments. I know some respectable characters who opposed this Government on these grounds; but I believe that the great mass of the people who opposed it, disliked it because it did not contain effectual provisions against the encroachments on particular rights, and those safeguards which they have been long accustomed to have interposed between them and the magistrate who exercises the sovereign power; nor ought we to consider them safe, while a great number of our fellow-citizens think these securities necessary.

James Madison, as quoted in Joseph Gales (comp.), *The Debates and Proceedings in the Congress of the United States* (Washington, 1834), I, 433.

Questions

1. What was Hamilton's argument concerning the First Amendment and freedom of the press?
2. Was Hamilton for or against the adoption of a Bill of Rights?
3. What did Madison believe was the principal reason why some of the people were opposed to adopting the Constitution?
4. Was Madison for or against the adoption of a Bill of Rights?
5. If you were a member of the First Congress considering proposing the Bill of Rights to the states for ratification as amendments to the U.S. Constitution, how would you vote? Why?

Activity 1-E

State Action

Does the Bill of Rights permit the following?

> *The legislature of the State of Nebraska hereby creates the Church of the Sower and recognizes it as the official state religion of Nebraska.*

Clearly such a law would be in violation of the Bill of Rights that is part of the *Constitution of the State of Nebraska*. Section 1, article 4 of the Nebraska Constitution reads in part:

> *All persons have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No person shall be compelled to attend, erect, or support any place of worship against his consent, and no preference shall be given by law to any religious society, nor shall any interference with the rights of conscience be permitted...*

Would the law also be in violation of the First Amendment to the *United States Constitution?*

> Look carefully at the First Amendment. It reads in part:
>
> *Congress shall make no law respecting the establishment of religion....*

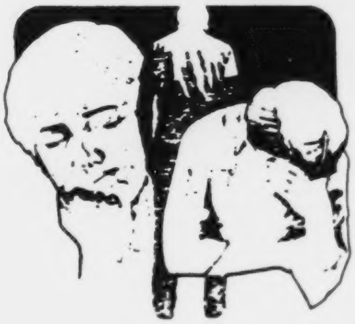
The First Amendment says Congress shall make no law; it says nothing about what a state legislature can or cannot do. So at first glance it looks as though the United States Bill of Rights would not prevent the State of Nebraska from creating an official state religion. This is consistent with the reasoning behind adding the Bill of Rights to the U.S. Constitution. People feared the power of the new federal government and felt the need to protect individual liberties from the abuse of that power. It was believed that state constitutions contained sufficient protections against the abuse of the power of state governments.

However, after the Civil War, amendments were added to the Constitution that contained restrictions on the power of the states. One such restriction is a provision in the Fourteenth Amendment which says:

> *Nor shall any State deprive any person of life, liberty, or property, without due process of law....*

In trying to decide what the word *liberty* as used in the 14th Amendment means, the Supreme Court has concluded that it refers to the "principle[s] of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental." By and large these fundamental principles are those contained in the Bill of Rights. Thus, on a case by case basis, the Supreme Court has decided that many of the fundamental freedoms guaranteed the American people against the abuse of federal governmental power also serve as checks against the power of state government. For example, the states may not (1) restrict citizens' exercise of free speech, press, or religion; (2) engage in unlawful searches; or (3) deny accused persons the right to confront witnesses against them.

Accordingly, if the State of Nebraska tried to declare the Church of the Sower as the official state religion, such an action would violate the 14th Amendment to the United States Constitution, which applies the First Amendment to the states. Because local governments such as cities, counties, and school boards are considered part of state government, the restrictions of the Bill of Rights apply to them as well.



Implicit in all this is the notion that the Bill of Rights applies only to the actions of *government*. Whenever something is done by government, or by a government employee acting within the scope of his or her employment, it is called "state action." In order for there to be a violation of constitutional rights there must be state action. (An exception is the 13th Amendment's prohibition of slavery which applies to both government and private action.)

Here is an example. The First Amendment says "Congress [government] shall make no law...abridging the freedom of speech, or of the press...." If the government of your town passed a law that said, "No newspaper shall print a letter written by anyone under 18 years of age" that would be a violation of the newspaper's freedom of the press as well as a violation of the freedom of these persons under 18 years old who want to write a letter to the newspaper and have it printed. However, if a privately owned newspaper itself decided that it would not print letters from anyone under 18 years old, although it would be unfair, it would not be a constitutional violation because there was no state action. The newspaper is not government.

Although the Bill of Rights by and large protects individual freedom only from the overreaching or undue intrusion *by the government*, we are protected from intrusion by private citizens by laws. For example, if Randy, a private citizen, steals Nelson's billfold containing $100, the Constitution has not been violated even though, in the words of the Fourteenth Amendment, Nelson has been "deprived of his property without due process of law." It is not unconstitutional for private citizen Randy to rob private citizen Nelson because the Constitution prohibits only *government* from depriving a citizen of property without due process of law. The protection of the individual citizens' right not to have his money taken from him by another private citizen is contained in the criminal laws against robbery — laws passed by state government. It is a protection created by the government, not a protection contained in the Constitution. Likewise, a private employer may discriminate in his or her hiring practices without violating the Constitution's equal protection clause because the employer is not government. However, the employer may be violating federal, state, and local statutes that prohibit such discrimination.

Questions

In the situations listed below is there state action?

1. A police officer searches the car of a high school student she has stopped for speeding.

2. The University of Nebraska has a rule against Bible reading and group prayer in the Nebraska Union.

3. All of the members of Parents Against Drugs In Schools search their children's rooms.

4. A prison guard reads a prisoner's mail.

5. A karate practitioner unknowingly induces internal bleeding in his sparring partner, killing him.

6. An 18 year old male's auto insurance rates are higher than that of his 18 year old girlfriend even though they both drive the same type of car for about the same distance each day and each has a perfect driving record.

7. The Internal Revenue Service (IRS) asks to see a taxpayer's personal checks and records.

8. A law requires newspapers to let movie stars read articles about them before publication.

9. A conservative religious college which receives no government funds forbids students from dating persons of a race different than their own.

10. The coach of the public high school's softball team searches each of her team members' lockers.

11. The State Fire Inspector who has held office for four years has written many citations, but never to a white homeowner in his district where the population is 75% white.

12. A state social services counselor tells her neighbors' children that they may not loudly discuss politics on her lawn.

The Borderline Between State Action and Private Action

In most cases it is clear whether or not there has been state action. There are some cases, however, that are in the gray area between state action and the action of private individuals. In these cases the actor appears to be a private party, but his or her actions are clearly tied to government. For instance, the seemingly private person or entity may be performing tasks that are traditionally associated with government and that are operated almost exclusively by government — like political parties holding primary elections. Another example is where the government commands or encourages the private person to engage in an activity which would be unconstitutional if performed by government — like the state legislature passing a law prohibiting restaurants from serving both black and whites in the same building. A third example is where the government substantially aids the private entity in its wrongdoing — like the giving of textbooks to a private school that accepts only white students.

In these cases the courts often find that the activity of the seemingly private individual is really state action. Each case is decided separately, according to its own particular fact situations, however, and it is hard to find patterns among those cases where state action is found and those where it is not.

Questions

In the following situations do you believe there is enough connection between the government and the activities of the private person or entity that is accused of violating another's rights that it would be fair to regard the private actor's activities as state action and to require the private actor to comply with the Bill of Rights? What are the reasons for your answers?

1. The State Historical Society Museum contains a gift shop where souvenirs and gifts are sold. The museum was built with state tax dollars and private donations. A state agency runs the museum, but leases the gift shop to a private company which runs it. The gift shop refuses to buy handicrafts made by handicapped people even though quality items are available. The gift shop owner explains, "They always get preferential treatment and have their own gift shop. We shouldn't have to buy from them." In addition, no handicapped persons or members of minority groups have ever been hired to work in the gift shop although well-qualified minority and handicapped persons have applied.

2. Citizens opposed to the U.S. government's involvement in Central America organized a protest demonstration at the Conestoga Mall in Grand Island. The demonstration was stopped by the mall's security guards. Conestoga Mall is a large privately-owned shopping center containing shops, restaurants, and movie theaters. The protesters claim the mall's owners violated their First Amendment right of freedom of speech.

3. The Moose Lodge is a private club which only admits white members. The club receives police and fire protection from the city and is inspected by the city's health and fire inspectors. It has a liquor license issued by the city and it does not have to pay state taxes because it is a fraternal organization engaging in beneficial and charitable activities. When a black is denied membership in the lodge, he sues, claiming the lodge is violating the equal protection clause of the Fourteenth Amendment.

4. A group of neighbors sign an agreement among themselves agreeing not to sell their homes to blacks. One of the neighbors breaks the agreement and sells his home to a black family. The other signers of the agreement go to court, asking the court to enforce the agreement and nullify the sale to the black family.

Activity 1-F

The March

The "Sons of Liberty" is a self-styled "patriotic" organization that believes the United States of America was created to promote the superior values of "the white, Protestant race." Accordingly, it believes that blacks, Jews, Catholics, and "other immigrant scum" should not be allowed to vote or otherwise participate in American politics. The Nebraska chapter of "Sons of Liberty" has applied to the City of Lincoln to conduct a march on Centennial Mall near the State Capitol. The purpose of this march is to promote the organization's views. The City of Lincoln denies the group's application for a permit because in the words of a spokesperson, "We find the positions that the 'Sons of Liberty' advocates to be abhorrent and contrary to the Bill of Rights." The "Sons of Liberty" sues the city in federal district court, claiming that the city's failure to permit the march violates the group members' First Amendment right to freedom of speech. The suit asks the court to order the city to issue the group a permit to march. A scientifically conducted poll published by the *Lincoln Star* reveals that 94% of Nebraska citizens agree that the "Sons of Liberty" should not be allowed to hold its march.

Questions

1. To what extent should the judge who is hearing the case take into consideration the *Lincoln Star* poll? What are the reasons for your answer?

2. Based on what you now know about the extended Bill of Rights, what do you believe a "right" is as that term applies to the rights guaranteed by the Bill of Rights? How does a right differ from a privilege (such as the privilege to drive a car) and from a law (such as the law that says that one must stop at a red traffic signal)?

Activity 1-G

Which Rights Mean the Most?

The following column appeared in the January 7, 1987 issue of the Lincoln Journal:

Which rights mean most?

By Nicholas von Hoffman

The dispatch out of Moscow was treated here as something of a one-day, man-bites-dog story. Fifty Russian immigrants to the United States, disappointed with life in America, had returned home to the land of their birth.

Before our pride gets too bent out of shape, it's best to recall that, tributes to the Statue of Liberty or no, in the past fully a third of all immigrants to our nation chose to go back where they came from. Moreover, the 50 returning Russians are but a small fraction of the thousands who have come here in recent years and show no signs of wanting to leave.

With that said, the returnees are telling us that at least some people are indifferent enough to human rights abuses in their native land to return there even after having had a taste of freedom. Clearly, then, Russia isn't a nation full of Andrei Sakharovs, gagged and straining to speak words of defiant dissent.

Hardly surprising. Most people everywhere pretty much go along with the program. In America the First Amendment right of freedom of speech is seldom used. Millions of us grouse and complain about the government, but few of us, even once in a lifetime, raise our voices to say the sharply critical things that would invite official retribution were it not for our constitutional protections.

On television today the 1960s are ordinarily referred to as the Decade of Protest, but in fact only a small percentage of our population ever came close to protesting anything. Most college students, the contrary myth notwithstanding, never picketed, never sat in, never marched, never raised their voices.

In either society an Andrei Sakharov is a rare individual. Most of us, here or in Russia, are too busy making a living and raising families and being self-involved to make even small gestures of dissent. For 99.9 percent of the population the grand argument over human rights abuses is an irrelevant abstraction. Soviet citizens don't enjoy anything like the protections conferred on us by the Bill of Rights, but there is little evidence that it makes any difference to them.

The situation in the smaller communist countries of eastern Europe is quite different, but in the Marxist heartland, in Russia itself, we might ask ourselves if our human rights foreign policy is being directed toward a people who have evinced no interest in being liberated by us. Have our failed attempts to bring human rights to an uninterested Russia accomplished anything beside winning us a reputation as buttinskies and blocking our chance to make deals with the Soviets in our own interest?

One of the returning emigres was quoted as saying, "A man has to become a wolf there to survive." Indeed, a person coming from another culture, which puts a higher premium on cooperation, might find our "free competition" more than a trifle lupine.

Exactly what belongs on the list of human rights is not self-evident. Once you get past protection from midnight arrest, torture and shipment to the Gulag Archipelago, things bec highly debatable. Is freedom of the press an alienable human right or would some millions of Americans be happy to swap it for, say, the guarantee of gainful employment?

For most people, which would be more of a human right: a job or an uncensored newspaper? For millions of other older Americans, which would they pick: the right to bear arms or the knowledge that they won't have to sell their house and take a pauper's oath if they're struck by catastrophic illness? For the growing number of homeless on our streets, which human right would they choose first: freedom of religion or a roof and warm bed?

Perhaps we should bid the Russian returnees good luck and farewell, and then debate whether the list of human rights in America is as long and complete as it ought to be.

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Question

Write an essay commenting on Nicholas von Hoffman's column and on the question, "Which rights mean the most?"

We the People

THE BILL OF RIGHTS:

A Law-Related Curriculum for High School Students

Lesson 2:
Freedom of Speech

Written by

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We the People

A project of
The Bill of Rights in Nebraska

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Funding for this project is provided by a grant from the Nebraska Committee for the Humanities, an affiliate of the National Endowment for the Humanities and grants from the Cooper Foundation, the Walter Scott Jr. Foundation, the Robert Veach Foundation, and the Winthrop and Frances Lane Foundation.

TABLE OF CONTENTS

Lesson Two: Freedom of Speech

Introduction. 6

Goals. 7

Objectives. 7

Activities. 7

Media Resources. 8

Teaching Instructions

Activity 2A: Converting the First Amendment to Everday Language. 11

Activity 2B: The Great Debate. 12

Activity 2C: Ray Hardcopy. 13

Activity 2D: Moot Court. 19

Student Materials

Activity 2A: Converting the First Amendment to Everyday Language. 19

Activity 2C: Ray Hardcopy. 21

Activity 2D: School Board Removes Books From Library. 22

BILL OF RIGHTS

CURRICULUM EVALUATION

HIGH SCHOOL

Teacher ____________________

School ____________________

Grade ____________________

Lesson taught ________________

A. Please rate your degree of agreement/disagreement with the following statements:

	Totally Agree				Totally Agree
1) The lesson was well suited to my students' conceptual level.	1	2	3	4	5
2) The lesson provided new information.	1	2	3	4	5
3) The lesson presented concepts and information in a better manner than do traditional texts.	1	2	3	4	5
4) The lesson meshed well with our course outline for the semester	1	2	3	4	5
5) I personally learned something from the lesson.	1	2	3	4	5
6) The materials were complete enough for good presentation.	1	2	3	4	5
7) I feel the lesson will be thought provoking for students (stimulate out of class thought & discussion).	1	2	3	4	5
8) I can pick up on the lesson in subsequent classes.	1	2	3	4	5
9) I think the lesson challenged some students' attitudes.	1	2	3	4	5
10) The lesson incorporated, built upon material we have already covered.	1	2	3	4	5
11) I was able to use the lesson *as is*.	1	2	3	4	5
12) I *adapted* the lesson in my presentation.	1	2	3	4	5
13) I would consider using more such materials in my classes.	1	2	3	4	5
14) I feel the materials are deficient in some way.	1	2	3	4	5

Please respond to the questions on the next page also.

Mail completed form to:
Alan Frank, University of Nebraska, College of Law, Lincoln, NE 68583-0902

B. Please answer the following:

1) Describe students' reaction/participation to this lesson:

2) What do you consider the best point of this lesson/activity?

3) What suggestions do you have for adapting or modifying this lesson/activity?

4) Were the materials adequate? How could they be improved?

Lesson 2
FREEDOM OF SPEECH

We the People

INTRODUCTION

> *"I disapprove of what you say, but I will defend to the death your right to say it."*
> *- Voltaire.*

The First Amendment to the U.S. Constitution guarantees freedom of speech. This means government may not unreasonably interfere with individuals' rights to speak or otherwise express their ideas. One of the reasons the Constitution guarantees this right is to allow the free expression of a wide range of ideas. When all points of view are allowed to be expressed, decisions will not be made on the basis of incomplete information. This marketplace of ideas is important to the functioning of a democratic society. No one, not even the government, has a monopoly on ideas.

However, the First Amendment's free speech provision has not been interpreted to be absolute. The right of an individual to express his or her views needs to be balanced against the needs of society. Thus the government may prohibit obscene speech and allow individuals to sue for libel and slander. It can impose reasonable restrictions of time, place, and manner on speech (e.g. citizens may be prohibited from organizing a march that ties up traffic) and can limit speech that imposes a "clear and present danger" to good order (like yelling "fire" in a crowded theater). While the First Amendment does protect communication through symbols such as buttons or arm bands, it does not protect otherwise illegal conduct such as spray painting political slogans on a public building.

This lesson introduces the students to the right of and limitations on free speech as set forth by the First Amendment and by court cases interpreting it. More information on the topic of this lesson can be found in the chapter on Freedom of Speech in *A Non-Lawyers Guide to the Bill of Rights*, prepared by the Bill of Rights in Nebraska Project.

GOALS

1. To understand the importance of the First Amendment's protection of freedom of speech.
2. To understand the delicate balance between the First Amendment's protection of the individual's right of free speech and society's need to maintain order.

OBJECTIVES

As a result of this lesson, students will be able to:

1. Convert the First Amendment to everyday language *(Activity 2-A)*.
2. State what role freedom of speech plays in a democratic society *(Activity 2-B)*.
3. Analyze hypothetical situations that examine potential conflicts between free speech and public order *(Activity 2-C)*.
4. Evaluate the balance between an individual's freedom of speech and society's need for order *(Activity 2-C)*.
5. Apply their knowledge of First Amendment protections of freedom of expression in a moot court argument *(Activity 2-D)*.

ACTIVITIES

		Teaching Instructions	Student Materials
Activity 2-A.	Converting the First Amendent to Everyday Language	11	19-20
Activity 2-B.	The Great Debate	12	----
Activity 2-C.	Ray Hardcopy	13-16	21
Activity 2-D.	School Board Removes Books From Library! A Moot Court Experience (enrichment)	17	22-25

We the People

MEDIA RESOURCES

(Reprinted in part from *this Constitution: A Bicentennial Chronicle*, Summer 1986, published by Project '87 of the American Historical Association and the American Political Science Association.)

FREEDOM OF SPEECH

The film uses the case of a controversial speaker convicted of disturbing the peace to stress the importance and complexity of the issues involved in free speech. The lawyers argue the constitutional issues in an appeals court. From *Bill of Rights in Action* series, BFA Educational Media, 1968, 21 minutes, color.

SPEECH AND PROTEST

As an introduction to the First Amendment, this film dramatizes situations where freedom of speech or assembly might be questioned. Students discuss foreign policy and academic freedom, and an anti-war demonstration at a chemical plant is enacted. Alternative conclusions are included. From the *Bill of Rights* series, Churchill Films, 1967, 21 minutes, color.

RIGHTS, WRONGS AND THE FIRST AMENDMENT

The film uses such events as the Palmer Raids of World War I, forced relocation of Japanese Americans in World War II, hearings of the Cold War, conspiracy trials of the Vietnam conflict, and the Watergate invasions of privacy to trace the history of freedom of speech, freedom of the press, and freedom of assembly in the U.S. It dramatizes the difficulties of integrating personal freedom with legitimate national security needs. Stuting Educational Films, 1974, 27 minutes, color.

THE RIGHT OF PETITION

This film dramatizes the viewpoints of John Quincy Adams and Thomas Marshall in 1842 as they argue the southern states' "gag rule." From the *History Alive* series, TW Productions, Walt Disney Productions, 1970, 13 minutes, color.

FREEDOM TO SPEAK: THE PEOPLE OF NEW YORK VS. IRVING FEINER

This film combines reenactments with interviews of participants in the case of a college student whose conviction for incitement to riot was upheld by the U.S. Supreme Court. It shows how constitutional interpretations vary with time and changes in public opinion and raises the issues of freedom v. security, liberty v. law, right v. responsibility, and liberty v. license. From *Our Living Bill of Rights* series, Encyclopedia Britannica Educational Corp., 1967, 23 minutes, color.

FREEDOM OF SPEECH

This videotape program raises such questions as: What are the major constitutional issues about the meaning of and limitations on free speech in the U.S.? Why is this constitutional guarantee valuable? From *A Video Project to Increase the Understanding of the United States Constitution for*

FREE TO BELIEVE

The key issue in this videotape involves the constitutional guarantees of expression and religion. Speaking from a television newsroom, host Peter Jennings explains that without freedom of the press he could nto function as an impartial journalist — nor could this program be produced. The videotape illustrates how the Constitution, by granting the rights of speech, assembly, and religion, has permitted an astonishing and often conflicting variety of opinions to flourish in this country. Portions of the videotape were shot in Florida, where pro- and anti-Contra factions clashed outside an Air Force base. From *We the People* series, American Bar Association, 1987, 56 minutes, color.

NEW TEST OF THE FIRST AMENDMENT

Does the First Amendment protect people who falsely yell "fire" in a crowded theater, the confidentiality of reporters' sources of information, and speakers who advocate violent overthrow of the government? This multimedia program explores the legal implications of recent Supreme Court rulings on these and other issues, such as the banning of the press from courtroom hearings, and news articles which reveal military secrets. Have these rulings changed the fundamental freedoms of speech, press, religion, and assembly guaranteed by the First Amendment? New York Times, 1980, sound filmstrip, color.

FREEDOM OF SPEECH

This sound filmstrip features the Watts case, the major decision regarding freedom of speech. Students are shown the historical background for this constitutional right, the value conflicts involved, the issue decided by the Supreme Court, the Court's majority and dissenting opinions, and the effect of the Court's decision. From *Our Constitutional Rights: Landmark Supreme Court Decisions* series, New York Times, sound filmstrip, color.

CENSORSHIP: PROTECTION OR REPRESSION?

This sound filmstrip considers the changing concepts, both legal and non-legal, concerning an individual's choice of books and films. The program is a chronological survey that discusses changes in mores through the years, current debates about movie ratings--G through X--and school book bans. How do students feel about reading controversial literature, seeing blue movies? What do their parents think? Guidance Associates, sound filmstrip, color.

We the People

TEACHING INSTRUCTIONS

Activity 2-A:

Converting the First Amendment to Everyday Language

We the People

Purpose: To acquaint students with the language and meaning of the First Amendment.

Student Materials: "Converting the First Amendment to Everyday Language" text, questions, and worksheet, pp. 20-21.

Directions:

1. Assign the students to read the text and to re-write the First Amendment using "plain English" on the worksheet.
2. Help the students try to reach a consensus on the wording of a "plain English" version of the First Amendment.
3. If consensus cannot be reached, utilize the disagreements to demonstrate the problem of not having more precise language — the amendment is subject to various interpetations. Explain that the court system decides disputes about the meaning and application of the First Amendment, with the Supreme Court as the final authority.

We the People

Activity 2-B:

The Great Debate

Purpose: To acquaint students with the First Amendment's protection of free speech and the importance of a free interchange of ideas to a democratic society.

Student Materials: None

Explanation: In this activity a "debate" is held in the classroom. However, unlike most debates, in this one the class is to hear only one side of the argument. It is hoped that the class will be upset at being deprived of hearing or expressing opposing viewpoints and that the students will realize that fair and prudent decisions cannot be made unless one has first considered all viewpoints and alternatives. This is a major reason why the First Amendment guarantees free speech — democratic government needs a free exchange of ideas.

Directions: There are many ways to arrange for the debate. If the class has members of the debate team in it, one or more of them can be asked to present one side of the current debate topic. Otherwise students can be selected to present one side of a topic such as Resolved: Hand guns should be banned in our community (see Lesson 6); School should be in session for the entire year with two six-week breaks; Required physical education should be dropped from the school curriculum; No student organization should be able to sell things to raise funds; The President of the United States is doing a good job.

A simple way to accomplish the objectives of this lesson is for you to present a one-sided argument on a topic. It would be best to choose the less popular side of the argument and not allow any student questions or responses.

When the "debate" is over ask the class questions like:

1. How do you feel about the debate?

2. Was it unfair not to let the other side talk? Why?

3. How does it feel not to be able to express your opinion?

4. If the only information you had on the topic was that which was presented in class, how would you decide the issue?

5. Do you think our government would be better if no one could criticize the government or its leaders?

6. What does this exercise tell you about the function of free speech in a democratic society?

Activity 2-C:
Ray Hardcopy

Purpose: To introduce students to the idea that freedom of speech is not absolute and that reasonable limits can be placed on speech.

Student Materials: "Ray Hardcopy" hypotheticals, pp. 22.

Directions:

Introduce the activity by asking the class: "Is freedom of speech an absolute right?" "What situations might permit government to take action to limit or restrict freedom of speech?"

After discussing their answers, direct the students to consider the Ray Hardcopy hypotheticals.

*Student discussion should focus on whether, **in their opinion**, the expression is protected by the First Amendment and why. To paraphrase Justice Jackson in* West Virginia *v.* *Barnette, 319 U.S. 624, 637 (1943), as schools are "educating the young for citizenship" it is important, particularly in a lesson on freedom of speech, to allow a full and open student discussion of the issues," if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."*

It is not necessary to provide the students with the "right" answers. However, listed below are cases which address the issues raised in the hypotheticals. Bear in mind that differences between the actual cases and the hypotheticals could result in different outcomes. The constitutionality of any mode of expression is judged on a case by case basis, balancing the rights of the individual against the needs of society.

An **alternative** approach would be to distribute to the students the case synopses and ask them to decide the Ray Hardcopy hypotheticals in view of the precedents. Scrambling the order of the synopses would heighten the challenge.

The final question asks the students to draw some conclusions from the exercise. Some points they may notice are that many of the restrictions that are found to be justified deal with the *time*, *place*, and *manner* of speech. In particular, a key question is — Will the communication substantially interfere with legitimate school activities or be disruptive? Restrictions on the content of speech are harder to justify, but are allowed if the speech presents a clear and present danger to public order (raised in #1), is obscene (#5), or is intertwined with illegal actions (#9 & #10).

Hypothetical #1 arguably does not present a situation that is a clear and present danger, as calling for the destruction of all government computers may not be advocacy "directed at inciting or producing imminent lawless action" nor is it "likely to produce such action." Had Ray incited the crowd to march on the principal's office and destroy the school's computers, it would in all likelihood constitute a clear and present danger that would permit governmental interference. As to the hostile crowd, the Supreme Court, in recent years, has tended to uphold the right to speak, and to not allow a "heckler's veto."

In *hypothetical #5* Ray is demanding the right to address a high school assembly. This arguably is a substantially different issue from that in *Stacy* v. *Williams*, described below — an organization requesting that an outside speaker be allowed to speak on a college campus.

1. Call for unlawful action:

Brandenburg v. Ohio, 395 U.S. 444 (1969)

Brandenburg, a leader of the Klu Klux Klan, conducted a rally, portions of which were telecast on a television news program. The footage used included derogatory remarks about blacks and Jews and showed weapons, symbols of the Klan, and a cross-burning ceremony. Brandenburg was convicted under an Ohio statute which forbade "advocating sabotage, violence, or unlawful methods of terrorism as a means of accomplishing . . . reform."

The U.S. Supreme Court overturned the conviction, emphasizing that while speech which threatens a clear and present danger to society is not protected by the First Amendment, the danger must be imminent. Statutes must distinguish between mere advocacy (which is protected free speech) and advocacy "directed at inciting or producing imminent lawless action and . . . likely to incite or produce such action" (which is not protected).

Hostile audience:

Feiner v. New York, 340 U.S. 315 (1951)

Feiner, from a wooden box on a street corner, was addressing a crowd of about 80 people. During the speech he made derogatory remarks about several political officials and called upon blacks to demand their rights. The crowd grew unruly and one man said to police officers that if they did not shut Feiner up, he would do it himself. When Feiner refused to stop he was arrested and convicted of disorderly conduct. The Supreme Court held that the arrest and conviction were proper because the crowd's reaction represented "a clear and present danger" of disorder. Two dissenting justices argued that the first duty of the police was to protect the speaker's right by dissuading those threatening violence.

Terminiello v. Chicago, 337 U.S. 1 (1949)

Terminiello, a suspended Catholic priest, addressed a public meeting during which he verbally attacked political and racial groups. A "howling" crowd gathered in protest. He was arrested and convicted of breach of the peace. The Supreme Court held that the ordinance under which he was charged was unconstitutional. Justice Douglas wrote, "a function of free speech . . . is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."

2. Critical comments:

Scoville v. Board of Education of Joliet, 425 F.2d 10 (7th Cir., 1970)

The Seventh Circuit Court of Appeals held that students who sold a literary magazine highly critical of the school, including saying that a senior dean had a "sick mind," could not be expelled, unless it could be shown that publishing the paper and distributing it to students would substantially disrupt or materially interfere with school procedures.

3. Sound amplification:

Wisconsin Student Association v. University of Wisconsin Regents, 318 F. Supp. 591 (W.D. Wis. 1970)

A federal district court held unconstitutional a state statute forbidding use of sound-amplifying equipment in a state university without permission of the administration. Courts have recognized that amplified sound may intrude on other rights, so states may constitutionally restrict sound amplifying equipment and other forms of disruptive expression. The court found in this case, however, that the statute was too broad. The statute failed to set any objective standards to govern the exercise of discretion by the administration — for instance, the statute did not spell out the hours during which the loudspeakers could be used, the places where they could be employed, or the volume of sound that could be used.

Disruption:

Grayned v. City of Rockford, 408 U.S. 104 (1972)

Blacks demonstrated near the grounds of a school which they felt was unresponsive to their complaints. They were arrested under an ordinance that prohibited making noise that disturbs the peace or good order of a school. The United States Supreme Court held that the ordinance was constitutional as it only prohibited expression that materially disrupted classwork.

4. Picketing:

Police Department of Chicago v. Mosley, 408 U.S. 92 (1972)

Mosley peacefully picketed a high school to protest discrimination. He was arrested under an ordinance that prohibited picketing, except labor picketing, close to a school from one-half hour before the school was in session to one-half hour after it had concluded. The ordinance was held unconstitutional because it described permissible picketing *in terms of its subject matter*. The Court pointed out that while picketing was protected by the First Amendment, it is subject to time, place, and manner restrictions. Preventing disruption of a school is a reasonable reason to restrict picketing; here, however, the picketing was peaceful and in the ordinance Chicago itself had determined that peaceful labor picketing during school hours was not an undue interference with school.

5. Public forum:

Stacy v. Williams, 306 F. Supp. 963 (N.D. Miss., 1969)

Acting on complaints brought by university students about the state universities' off-campus speaker policies, a federal district court held that while college officials can make and enforce reasonable rules, they cannot prohibit the voicing of views which the majority of students or teachers find disagreeable, as long as the school is open to other outside speakers. Speakers who pose a clear and present danger to the school's orderly operation by advocating violence can be prohibited. If an organization's request for an outside speaker is denied, there must be a fair and prompt review procedure for challenging the administration's decision.

Obscene/vulgar:

Miller v. California, 413 U.S. 15 (1973)

Obscenity is not entitled to First Amendment protection. Materials are obscene if they 1) as a whole appeal to a prurient interest in sex, 2) are patently offensive and violate contemporary community standards, and 3) are without serious literary, artistic, political, or social value.

Bethel School District No. 403 v. Fraser, 106 S. Ct. 3159 (1986)

A public high school student delivered a speech nominating a fellow student for a student elective office at a voluntary assembly that was held during school hours as part of a school-sponsored educational program in self-government. During the speech the student used graphic and explicit sexual metaphors, but no obscene words. The student was suspended from school for three days and his name was removed from a list of candidates for graduation speaker at the school's commencement exercises. The student claimed this action infringed on his right of free speech. The Supreme Court disagreed and upheld the disciplinary action. The Court decided that while under the First Amendment the use of an offensive form of expression may not be prohibited when adults make what the speaker considers a political point, the same latitude need not be given students in a public school. The Court concluded that it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.

The dissenting justices disagreed, arguing that it is a highly inappropriate function of public school education to censor political debate, even when the form of the debate is offensive to some.

6. Speech plus action:

Barker v. Hardway, 283 F. Supp. 228 (1968)

Students at Bluefield State College engaged in a protest demonstration against the school's administration at a football game. They marched across the playing field during half-time and during the second half harassed and menaced adminstration, faculty, and police. When the president tried to leave, his car was beaten upon and rocked. Two police offers were hit by rocks.

The federal district court held that the activities of the students after the half-time march were abusive and disorderly, depriving others of the right to see and enjoy the game in peace and with safety. They exceeded the bounds of free speech. The court upheld the students' suspensions.

7. **Symbolic speech:**

Brown v. Louisiana, 383 U.S. 131 (1966)

Blacks were not allowed to use the reading room in a public library. A group of blacks entered the library, asked for a book, and then went to the reading room and refused to leave. There was no noise or boisterous talking. The United State Supreme Court, in a 5-4 decision, held that the convictions of the blacks under a breach of the peace ordinance violated their right to freedom of speech and freedom of assembly. The majority concluded that the peace was not breached and that the First Amendment protects not only verbal expression, but also a silent presence. Justice Black, writing for the dissenters, contented that "groups that think they have been mistreated or that have actually been mistreated [do not] have a constitutional right to use the public streets, buildings, and property to protest whatever, wherever, whenever they want, without regard to whom such conduct may disturb."

8. **Symbolic speech:**

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969)

Several students were suspended for wearing black armbands to school in protest of the Vietnam War. The Supreme Court held that the students had a right to express their views unless their actions substantially interfered with school discipline or with the rights of others. The Court said that the wearing of armbands is a type of speech and is protected by the First Amendment.

Two justices disagreed, arguing that the widest possible latitude must be accorded school officials to maintain proper discipline. As long as the principal's order was not intended to prohibit an unpopular point of view while permitting majority opinion, it should be permitted.

9. **Flag burning:**

Street v. New York, 394 U.S. 576 (1969)

Street, after hearing about the shooting of James Meredith, a civil rights leader, burned his personally owned American flag on a street corner saying, "We don't need no damn flag." Street was convicted of violating a statute that prohibited mutilating or casting contempt upon any flag of the United States. The U.S. Supreme Court, in a 5-4 decision, overturned the conviction, but did so on narrow grounds. The Court concluded that Street's conviction was based on his words alone or his words and actions together. According to the Court, a conviction based on Streets' words — totally or in part — would be unconstitutional. The Court avoided the issue of whether flag desecration by action alone was protected by the First Amendment. The four dissenting justices believed the issue was flag burning and argued that government can protect the flag "from acts of desecration and disgrace."

Spence v. Washington, 418 U.S. 405 (1974)

The Supreme Court decided that affixing a peace symbol to a privately owned American flag and hanging it upside down is a form of constitutionally protected free speech. The Court pointed out that the flag was not permanently disfigured or destroyed. Justice Rehnquist, dissenting, argued that a state should be able to limit the ways the American flag, "a unique national symbol," is used without violating the Constitution.

10. **Speech plus unlawful action:**

United States v. O'Brien, 391 U.S. 367 (1968)

The Supreme Court upheld the conviction of O'Brien, who burned his draft card in protest over the war in Vietnam. The Court concluded that when "speech" and "non-speech" elements are combined in the same course of conduct, asufficiently important governmental interest in regulating the illegal non-speech element can justify incidental limitations on First Amendment freedoms.

Activity 2-D:
Moot Court
AN ENRICHMENT ACTIVITY

Purpose: To provide students with a moot court activity involving freedom of speech.

Student Materials: "School Board Removes Books from Library! A Moot Court Experience" explanation, facts of the case, sample arguments, pp. 23-26.

Directions: Most of the information needed to conduct this activity is found in the student materials. It is important that the students understand that the issue is not whether the school board's intent was to deny the students access to certain ideas with which the board disagreed. The issue is whether, *if that was their intent*, they violated the students' First Amendment rights.

1. Divide the class into three groups — students' lawyers, school board's lawyers, and judges — or select individuals to play these roles.

2. Give the lawyers time to prepare their arguments. Emphasize that the arguments are not to be read from the student materials. Rather the students should formulate arguments in their own words and may add arguments of their own to those suggested.

3. At the same time the judges should be thinking about the issues in the case and be formulating questions. Their questions should not be about facts that have not been provided, but rather questions of policy — e.g., Is there really a difference between removing books from circulation and failing to purchase books?

4. Have each group select three persons to represent the group at the actual argument or set up several arguments so that more students can participate.

5. Follow the procedures in the student materials for conducting the arguments.

6. Debrief the activity by analyzing the issues and the job done by the students.

This was an actual case argued before the United States Supreme Court. In *Board of Education, Island Trees Union Free School Dist. No. 26 v. Pico,* 457 U.S. 853 (1982), the Court ordered a trial on the merits of the case to determine what the actual motivation of the school board was. If the board removed the books solely because it wanted to restrict ideas, the action was a violation of the students' First Amendment right of access to information. Removal intended to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion" is prohibited. If the board removed the books for other reasons — such as "educational suitability" — the action was within the board's discretion. The decision was on a 5-4 vote with Justices Brennan, Marshall, Stevens, Blackmun, and White deciding for the students and Justices Burger, Rehnquist, Powell, and O'Connor dissenting.

We the People

STUDENT MATERIALS

Activity 2-A

Converting the First Amendment to Everyday Language

The First Amendment to the U.S. Constitution reads:

> **Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.**

After reading the First Amendment, do the following:

1. Write your own "plain English" version of the First Amendment using the worksheet on the next page. In other words, restate the Amendment in language that can be used to explain the Amendment to other students.

2. Compare your "plain English" version with the versions of other students. How are they similar and how do they differ?

Activity 2-A

Converting the First Amendment to Everday Language Worksheet

The Amendment	"Plain English"
CONGRESS SHALL MAKE NO LAW	
RESPECTING AN ESTABLISHMENT OF RELIGION,	
OR PROHIBITING THE FREE EXERCISE THEREOF;	
OR ABRIDGING THE FREEDOM OF SPEECH,	
OR OF THE PRESS,	
OR THE RIGHT OF THE PEOPLE PEACEABLY TO ASSEMBLE,	
AND TO PETITION THE GOVERNMENT FOR REDRESS OF GRIEVANCES.	

Activity 2-C

Ray Hardcopy

Ray Hardcopy is a student at Glich High School. Ray is also a member of CAPU (Citizens Against Programming, United), an organization that believes that people rely too heavily on computers. The group advocates the elimination of all computers in government agencies including schools. Below is a list of possible methods by which Ray could express his views and concerns about computers. Indicate beside each method whether this method of expression ought to be protected by the First Amendment by writing "yes" or "no" beside each number. Be prepared to explain your answer.

1. Ray speaks on the corner near the school calling for the destruction of all government computers. A crowd gathers and some in the crowd threaten to beat him up.

2. Ray, in front of the school, hands out leaflets to the students as they enter the school. The leaflets accuse the school of destroying the youth of America, and call the principal a computer nerd.

3. Ray uses a sound truck to express his views in front of the school during classes.

4. While classes are in session Ray pickets in front of the school with a sign saying "Un-plug Computers".

5. Ray demands to speak about computers to the student body at a school assembly. When allowed to do so he gives a vulgar speech, filled with sexual references.

6. Ray gets up at halftime of a basketball game and begins speaking about how computers have corrupted sports.

7. Ray enters the school library and asks for a book called *Overcoming the Computer State*. When the librarian tells him the library does not have that book, he sits down and refuses to leave.

8. Ray enters the school displaying a "monitor green" armband to protest the use of computers.

9. Ray burns the American flag in front of the school saying, "I will not respect this flag until the U.S. stops using computers."

10. Ray throws a rock through a school window breaking it. On it is written the message: "The Computer Is Down."

After considering these situations, what can you say generally about the issue of maintaining a balance between each citizen's right of freedom of speech and society's right to order?

Activity 2-D

School Board Removes Books From Library!
A Moot Court Experience

In this activity your class is to conduct a moot (practice) court argument in a lawsuit brought by a group of students against a school board. The trial judge decided for the school board. The students are now bringing the case (appealing it) to the Court of Appeals, contending that the trial judge was wrong.

Some of you will be the lawyers representing the students and will make arguments for them. Others of you will be the lawyers representing the school board and will argue for the board. A third group will be the Court of Appeals judges who can ask the lawyers questions and decide the case. In an appeals hearing no evidence is presented. There are only arguments by lawyers.

Procedure:

1.Lawyers for the students have 10 minutes to make their argument.

2.Lawyers for the school board have 15 minutes to make their argument.

3.Lawyers for the students have 5 additional minutes for rebuttal.
4.During the arguments the judges may interrupt to ask questions.

5.When the arguments are concluded the judges confer and announce their decision, giving reasons why they decided the way they did.

Included in your materials are the facts of the case and some arguments you may wish to use. **Facts of the Case**

The ________ Board of Education, __________ County, Nebraska ordered nine books removed from the high school's library and one book removed from the library of the junior high school. The books are:

Slaughter House Five, by Kurt Vonnegut, Jr.

The Naked Ape, by Desmond Morris

Down These Mean Streets, by Piri Thomas

Best Short Stories of Negro Writers, edited by Langston Hughes

Go Ask Alice, anonymous

Black Boy, by Richard Wright

A Hero Ain't Nothin' But A Sandwich, by Alice Childress

Soul on Ice, by Eldridge Cleaver

The Fixer, by Bernard Malamud

A Reader for Writers, edited by Jerome Archer (junior high)

The board characterized the books as "anti-American, anti-Christian, anti-Semitic, and just plain filthy." The board stated that "it is our duty, our moral obligation, to protect the children in our schools from this moral danger as surely as from physical and medical dangers."

The sequence of events that lead up to the books' removal was as follows: The board obtained from a national politically conservative group a list of books the group thought students should not be permitted to read. The board appointed a special committee of four parents and four members of the school staff to decide whether each book on the list should be retained in light of "educational suitability, good taste, relevance, and appropriateness to age and grade level." The committee recommended that five of the books be retained and two be removed from school libraries. The committee could not agree on the other four. The board, however, ordered them all removed.

Four high school students and one junior high school student brought suit claiming that the board had violated their First Amendment rights by "contracting the spectrum of available knowledge." They claimed that the board members were acting to further their own moral and political views by removing books which they personally did not like. The case involved only the removing of the books from the library, not the buying of books or the use of books which were required reading.

The trial judge decided that the reasons why the board removed the books were unimportant. The job of local schoolwboards is to make educational policy and courts should notwinterfere in daily school operations unless basic constitutionalwvalues are clearly involved. The students are now appealing thewcase to a higher court (asking the higher court to decide thatwthe lower court had made a mistake). The students argue that the trial judge should have let them try to prove that the school board removed the books simply because they disliked the ideas contained in them and because they wanted to dictate what are the right views on topics like politics, nationalism, and religion.

If that was the case, they say, their First Amendment rights were violated.

The issue that the court of appeals has to decide is: Does the First Amendment limit a local school board's ability to remove books from high school and junior high school libraries in order to deny students access to certain ideas?

Arguments for the Students

1. The Supreme Court has said students have constitutional rights — even in school. First Amendment rights are directly and clearly involved by removing books from the shelves of the school library.

2. The First Amendment protects public access to information and ideas. The state may not reduce the spectrum of available knowledge. If someone has the right to express ideas, others surely have the right to hear them.

The idea behind the First Amendment is that a marketplace of ideas is necessary to enable citizens to hear a number of views and select the best. If the marketplace is to work well it must have buyers as well as sellers. In other words, the ability to hear messages is as important as the ability to express them.

3. We admit the school board can generally decide which books should remain in the library, but this judgment must be exercised without violating the First Amendment. If the school board decided to remove all books written by blacks or by Democrats it would clearly violate our First Amendment rights. This case is the same. They want to remove all books which go against their conservative political views. The First Amendment requires government to be neutral as to the content of materials. It cannot prevent ideas from being expressed simply because it does not like them. If some views are expressed, others may not be denied expression. The government cannot decide what the citizens will hear.

4. Students are in the process of learning to be citizens. As adult citizens we must make decisions about the ideas we hear or read, but if we are denied this opportunity as junior and senior high school students we will not learn to participate in our democratic society.

5. The school board has the duty to exercise its judgment where required curriculum is concerned, but use of the library isvoluntary. The board by providing books is not endorsingthem. The board may want a book to be available so thatstudents can be exposed to a wide range of ideas and learn to select the better reasoned ones.

6. Our Constitution does not permit the government to suppress ideas. Whether our First Amendment rights were violated depends on the motivation behind the school board's actions.
If the board intended to deny students access to certain ideas with which the board disagreed, and if this intent was the main factor in the board's action, then board members have violated the Constitution. This seems to be the case here. For instance, two board members wanted a book removed because it was unpatriotic — it said George Washington owned slaves.

If the books were removed solely for reasons of educational unsuitability or because they are vulgar it may have been constitutionally permissable to remove them. However, they were not, but were removed to limit student access to ideas.

7. The fact that the books were removed from an existing collection makes it more likely that the board was trying to limit access to ideas. Failure to purchase a book may occur for a variety of reasons such as limited funds or limited space, but removal of a book which is paid for and in an uncrowded collection is much more likely to be due to its content.

The First Amendment does not allow content-based restrictions. If the library allows some views it must allow others.

Arguments for the School Board

1. School boards have broad powers in the management of school affairs. This is true because public education is historically and by law the responsibility of state and local authorities and because school boards are democratically elected to govern local schools. These local boards have the responsibility of establishing the curriculum and ensuring that the schools operate the way members of the community wish it to.

2. Public schools are vitally important in the preparation of individuals for citizenship. Schools are to serve as vehicles for teaching fundamental values necessary to the maintenance of a democratic political system. The fundamental values taught should be those of the local community.

3. Local communities have a legitimate interest in promoting respect for authority and other values which are traditionally held in the community whether they are social, moral, or political. This may be done by structuring the curriculum and extra-curricular activities provided by the school.

4. The government may not unreasonably interfere with a person who wishes to spread ideas. Neither may it restrain some ideas and not others. However, the school board has no obligation to try to aid the speaker in his or her efforts to communicate with the listener or reader. Government, via the schools, has no obligation to be the messenger of ideas.

   The school is not required by the First Amendment to seek out every view and present it. Students can find these books in the public library or a bookstore.

5. The need to be informed does not create a new constitutional right of access to information. If this were the case adults could demand access to continuing adult education.

   Government cannot bear the expense of providing all citizens access to all information. They can find it themselves.

   The school board in removing these books is not reducing available knowledge, but choosing not to be a messenger of that information.

6. By providing these books it may appear that the school board is promoting the acceptance of the ideas in them. This would be a disservice to the students and the community.

7. Why should a fourteen-year-old child be able to challenge the actions of a school board? If we must answer to this, we'll be in court all the time when our real responsibility is to the adults who elected us.

8. The students say this case involves the removing of books and not the failure to purchase books, but if there is a right to receive information, removing books is not any different than failing to purchase them. Information is just as inaccessible if removed for good motives as for bad.

   Surely the court would not order a school to purchase certain books or say that a school board could not remove books from the library for any reason. Therefore there is no right of students to receive the information involved in this case.

We the People

THE BILL OF RIGHTS:

A Law-Related Curriculum for High School Students

Lesson 3:
Freedom of the Press

Written by

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We the People

A project of
The Bill of Rights in Nebraska

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Funding for this project is provided by a grant from the Nebraska Committee for the Humanities, an affiliate of the National Endowment for the Humanities and grants from the Cooper Foundation, the Walter Scott Jr. Foundation, the Robert Veach Foundation, and the Winthrop and Frances Lane Foundation.

We the People

TABLE OF CONTENTS

Lesson Three: Freedom of the Press

Introduction 6

Goal 7

Objectives 7

Activities 7

Media Resources 8

Teaching Instructions 10

- Activity 3-A: Freedom of the Press: A Constitutional Comparison 11
- Activity 3-B: Freedom of the Press in the Press 12
- Activity 3-C: Public Officials, Citizens, and Libel 14
- Activity 3-D: A Threat to National Security or Information for the Public? 16
- Activity 3-E: The Student Press 19
- Activity 3-F: The Electronic Media 22

Student Materials 25

- Activity 3-A: Freedom of the Press: A Constitutional Comparison 26
- Activity 3-B: Freedom of the Press in the Press 27
- Activity 3-C: Public Officials, Citizens, and Libel 30
- Activity 3-D: A Threat to National Security or Information for the Public? 31
- Activity 3-E: The Student Press 35
- Activity 3-F: The Electronic Media 45

BILL OF RIGHTS

CURRICULUM EVALUATION

HIGH SCHOOL

Teacher ______________________

School ______________________

Grade ______________________

Lesson taught ___________________

A. Please rate your degree of agreement/disagreement with the following statements:

	Totally Agree				Totally Agree
1) The lesson was well suited to my students' conceptual level.	1	2	3	4	5
2) The lesson provided new information.	1	2	3	4	5
3) The lesson presented concepts and information in a better manner than do traditional texts.	1	2	3	4	5
4) The lesson meshed well with our course outline for the semester	1	2	3	4	5
5) I personally learned something from the lesson.	1	2	3	4	5
6) The materials were complete enough for good presentation.	1	2	3	4	5
7) I feel the lesson will be thought provoking for students (stimulate out of class thought & discussion).	1	2	3	4	5
8) I can pick up on the lesson in subsequent classes.	1	2	3	4	5
9) I think the lesson challenged some students' attitudes.	1	2	3	4	5
10) The lesson incorporated, built upon material we have already covered.	1	2	3	4	5
11) I was able to use the lesson *as is*.	1	2	3	4	5
12) I *adapted* the lesson in my presentation.	1	2	3	4	5
13) I would consider using more such materials in my classes.	1	2	3	4	5
14) I feel the materials are deficient in some way.	1	2	3	4	5

Please respond to the questions on the next page also.

Mail completed form to:
Alan Frank, University of Nebraska, College of Law, Lincoln, NE 68583-0902

B. Please answer the following:

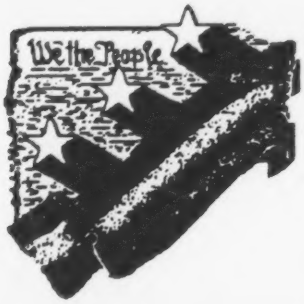
1) Describe students' reaction/participation to this lesson:

2) What do you consider the best point of this lesson/activity?

3) What suggestions do you have for adapting or modifying this lesson/activity?

4) Were the materials adequate? How could they be improved?

Lesson 3
FREEDOM OF THE PRESS



INTRODUCTION

Thomas Jefferson reportedly said that freedom of the press is so important that if he were forced to choose between a government without newspapers or newspapers without government he would unhesitantly choose the latter. In a democratic society, where citizens have a responsibility to be informed, a free press, independent from the judgment of government officials, plays a vital role in the effective functioning of the republic. This was recognized in colonial times when Alexander Hamilton successfully defended New York printer John Peter Zenger against charges of seditious libel for articles he had published criticizing the policies of New York's royal governor.

Free speech and free press have a great deal in common. Both embody the conviction that rational people will make wise and virtuous decisions if they have sufficient information. Both face limits when other important governmental or individual interests are at stake. Obscenity, libel, and false advertising, for example, are not protected by the First Amendment's freedom of the press guarantee.

More information on the topic of this lesson can be found in the chapter on Freedom of the Press in A *Non-Lawyers Guide to the Bill of Rights* prepared by the Bill of Rights in Nebraska Project.

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GOAL

To understand how the First Amendment's protection of freedom of the press affects our daily lives.

OBJECTIVES

As a result of this lesson, students will be able to:

1. Compare and contrast the free press guarantees of the U.S. and Nebraska constitutions *(Activity 3-A)*.

2. Recognize the importance of freedom of the press within a democratic society *(Activity 3-B)*.

3. Analyze the conflicts between freedom of the press and other societal needs, such as protection against libel, privacy, national security, public control of public schools, public access to the media, and the regulation of users of the public airwaves *(Activities 3-C, 3-D, 3-E, 3-F)*.

ACTIVITIES

	Teaching Instructions	Student Materials
Activity 3-A. Freedom of the Press: A Constitutional Comparison	11	26
Activity 3-B. Freedom of the Press in the Press	12-13	27-29
Activity 3-C. Public Officials, Citizens, and Libel	14-15	30-31
Activity 3-D. A Threat to National Security or Information for the Public?	16-18	32-34
Activity 3-E. The Student Press	19-21	35-44
Activity 3-F. The Electronic Media	22-24	45-46

MEDIA RESOURCES

FREEDOM OF THE PRESS
A reporter refuses to cooperate in a criminal investigation in order to protect the source of his news story. The film questions the meaning of the First Amendment's prohibition against laws that abridge freedom of the press. From *Bill of Rights In Action* series, BFA Educational Media, 1973, 21 minutes, color.

THE JUST AND ESSENTIAL FREEDOM
The film explores the confrontation between government and the press under the First Amendment by examining Watergate, the Vietnam War, the Pentagon Papers, censorship, and the forced disclosure of sources. It examines the relationships of several presidents with the press. Through conflicts of Jefferson and Adams it explains the background of the First Amendment. Xerox Films, 1973, 52 minutes, color.

THE JUST FREEDOM
The First Amendment is examined in depth, with examples of how the press operates at local and national levels. The film focuses on the important historical role of the news media in the United States, and compares U.S. newspaper and television news coverage with that of other countries. Associated Press, 1974, 22 minutes, color.

NEWS: A FREE PRESS
A discussion by prominent journalists on the issues of a free press in the U.S. The film includes questions of unofficial censorship and subjectivity of newsmen. Indiana University Films, 1977, 15 minutes, color.

FREE TO BELIEVE
The key issue in this videotape involves the constitutional guarantees of expression and religion. Speaking from a television newsroom, host Peter Jennings explains that without freedom of the press he could not function as an impartial journalist — nor could this program have been produced. The videotape illustrates how the Constitution, by granting the rights of speech, assembly, and religion, has permitted an astonishing and often conflicting variety of opinions to flourish in this country. From *We the People* series, American Bar Association, 1987, 56 minutes, color.

NEW TESTS OF THE FIRST AMENDMENT
Does the First Amendment protect people who falsely yell "fire" in a crowded theater, the confidentiality of reporters' sources of information, and speakers who advocate violent overthrow of the government? This multimedia program explores the legal implications of recent Supreme Court rulings on these and other issues, such as the banning of the press from courtroom hearings, and news articles which reveal military secrets. Have these rulings changed the fundamental freedoms of speech, press, religion, and assembly guaranteed by the First Amendment? New York Times, 1980, sound filmstrip, color.

THE FIRST AMENDMENT: FREEDOM OF THE PRESS This dramatic sound filmstrip helps students to understand how the principles of the First Amendment have been applied in American courts. By drawing a careful distinction between the concepts of "right" and "privilege," the program leads students through controversial court cases dealing with journalistic ethics and personal conduct. Guidance Associates, sound filmstrip.

FREEDOM OF THE PRESS This sound filmstrip features the *Pentagon Papers* case, a major decision regarding freedom of the press. Students are shown the historical background of this constitutional right, the value conflicts involved, the issue decided by the Supreme Court, the Court's majority and dissenting opinions, and the effect of the Court's decision. From *Our Constitutional Rights: Landmark Supreme Court Decisions* series, New York Times, sound filmstrip, color.

"CONGRESS SHALL MAKE NO LAW . . ."
Explores, in depth, the continuing conflict between protecting individuals' rights of free expression and society's need for order and stability. Shows how the First Amendment is not a guarantee of our most basic freedoms of speech and press, but rather a safeguard against *governmental interference* with those rights. From *The Constitution Project* series, The Constitution Project and WHYY Television, 1988, videotape, one hour, color.

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TEACHING INSTRUCTIONS

Activity 3-A:

Freedom of the Press:
A Constitutional Comparison

Purpose: To acquaint students with the free press provisions of the U.S. and Nebraska constitutions.

Student Materials: "Freedom of the Press: A Constitutional Comparison" handout containing provisions from the U.S. and Nebraska Bill of Rights, p. 25.

Directions: Instruct the students to read the free press provisions of the U.S. and Nebraska constitutions and answer the questions.

The Nebraska Constitution affirms an individual's freedom to write and publish, while the U.S. Constitution limits the power of Congress to restrict freedom of the press. The Nebraska constitutional reference appears to be much broader than the First Amendment of the U.S. Constitution.

Unlike the U.S. Constitution, the Nebraska Constitution clearly states that citizens are responsible for the "abuse" of freedom of speech and press liberties. The Nebraska Constitution goes on to address "trials for libel" with strong emphasis on the element of "truth" as a defense in such trials.

Activity 3-B:

Freedom of the Press in the Press

Purpose: To help students understand the importance of the First Amendment's guarantee of freedom of the press to the working of a democratic society.

Student Materials: "Freedom of the Press in the Press" instruction sheet and three news articles, pp. 26-28.

Directions:

1. Instruct the students to read the three news articles. Each of the articles deals with some aspect of press freedom. If you wish you may substitute other articles or assign the students to find appropriate articles.

2. Direct the students to answer questions 1a and 1b and discuss these answers with the class. Possible student answers are noted after each question.

Article 1: **"Judge Says He'll Release Evidence At Spy Trial"** *(Associated Press, September, 1985)*

How does this article demonstrate freedom of the press?

The press asked a U.S. District Court judge to issue a ruling that all evidence be made public in the espionage trial of Samuel Long Morrison. The article demonstrates that the press believes that "freedom of the press" should include access to evidence introduced by government prosecutors in public trials. The article also indicates that freedom of the press is not absolute; judges have some authority in controlling access to information.

How might this article be different if there were no freedom of the press?

If there were no free press, the entire trial might be conducted in secrecy. Or if the trial were public, the presiding judge might prohibit any press coverage. Or if the government controlled the press, the government would report only the evidence that the government wanted the public to know.

Article 2: **"Report: CIA Backed Blast In Nicaragua"** *(Associated Press, September, 1985)*

How does this article demonstrate freedom of the press?

Three reporters issued a public report claiming the United States CIA (Central Intelligence Agency) helped to carry out the bombing of a Nicaraguan guerilla leader, Eden Pastora. This type of report, accusing a government agency of contributing to a terrorist act, would probably not be permitted if there were no freedom of the press.

How might this article be different if there were no freedom of the press?

The article would probably not appear in the government controlled press. Or if these journalists released such a report without government permission, the journalists might be fired or jailed.

Article 3: **"Policy Eases Threat To Research"** (New York *Times News Service, September, 1985)*

How does this article demonstrate freedom of the press?

The article demonstrates that the press will continue to be able to report on unclassified federally financed fundamental research that is performed at colleges, universities, and laboratories. The article also indicates that access to information can be regulated by the federal government to protect the nation's security.

How might this article be different if there were no freedom of the press?

Without a free press, the government might control all information generated by federally funded research, regardless of the information's classification. If this information were restricted, then scientists would not be able to share findings and learn from their research.

3. Assign the students to re-write one of the articles to read as it might in a country without a free press. The story should tell people only what the government wants them to know. A rewritten article might look like this:

Judge Keeps Evidence Confidential In Order To Protect National Security

Baltimore *(GP, Government Press)* - A judge sealed evidence presented in the espionage trial of a Navy intelligence analyst accused of leaking secret photographs and information to the press.

In an effort to protect national security, the judge moved to keep all evidence confidential. The judge said, "The evidence will be presented to the parties in this case, but not to the public. The entire case is based on keeping classified information out of the press."

4. Ask the students to share their stories with the class.

5.Lead a class discussion on how society might be affected if the government controlled the flow of information.

Enrichment Activity: Using newspapers, magazines, radio, and/or television, have students identify news stories that have free press implications. For each identified news story, have students answer the following:

- How does the news story involve freedom of the press?

- How might the news story be different if there were no freedom of the press?

You may wish to create a bulletin board titled "Free Press Issues." Highlight the issues by headings:

Free Press and Personal Privacy
Free Press and National Security
Free Press and Access to Information
Free Press and Court Proceedings
Free Press and Obscenity

82

Activity 3-C:

Public Officials, Citizens,and Libel

Purpose: To explore the benefits of and limits to freedom of the press and speech as they relate to government officials and their critics.

Student Materials: *New York Times* v. *Sullivan* case study and questions, pp. 29-31 and "The Case of Raymond Henderson" reading and questions, pp. 32-33.

Directions:

1. Introduce the activity by explaining that, like freedom of speech, freedom of the press is not absolute. Courts have found that in some situations press freedoms must give way to certain other important interests, such as national security. Explain that in the next three activities the class is going to consider three traditional areas of conflict involving freedom of the press.

2. Tell the students that this activity focuses on limitations on a particular type of expression — libel — especially as it applies to public officials and their critics.

3. Instruct the students to read the *New York Times* case study on pages 29-31, and organize the students into groups of six. Each student should assume primary responsibility for answering one of the accompanying questions and leading group discussions of his/her question. Once a group response to the question has been determined, the group should move on to the next question. Majority and minority views on each question should be recorded and presented during the class discussion that follows.

4. When all groups have completed their work, use the questions as a basis for class discussion. It is important to focus on the Court's view that, because wide dissemination of information is necessary in a democracy, public officials inevitably face criticism. Justice Brennan, in the majority opinion in *Sullivan*, wrote:

> We consider this case against the background of a profound national commitment to the principles that debate on public issues should be uninhibited, robust, and wide open, and that it may very well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

Regarding the errors in the ad, the Court concluded that erroneous statements are inevitable in free debate, and that even they must be protected if freedoms of expression are to have the "breathing space that they need . . . to survive." Nevertheless, the Court felt that some protection should be accorded public officials. The majority opinion concluded that public officials had grounds for a suit if they could prove that the statement was made with **"actual malice"** — that is, "with the knowledge that it was false or with reckless disregard of whether it was false or not."

5. During the debriefing:

-compare the Court's reasoning with that presented by the students,

-consider the fairness of exposing public officials to public criticism, and

-consider the consequences of shielding public officials from public criticism.

6. Critics contend that the *Sullivan* case opened a Pandora's box by allowing public officials to sue for libel under certain circumstances. Some observers contend that public officials have used this loophole to silence their critics by bringing frivolous suits that are costly to defend. Rather than incur the risk of a costly defense, watchdog citizens simply remain quiet. To examine this issue, instruct the students to read "The Case of Raymond Henderson," pp. 32-33. When they have finished, have the students work in pairs to respond to the questions. Use the questions as a basis for class discussion.

This activity was written by Dale Greenawald and was published in the Fall 1985 issue of ***Update on Law-Related Education,*** *published by the American Bar Association. It is used with the permission of the American Bar Association.*

Activity 3-D:

A Threat to National Security or Information for the Public?

Purpose: To assist students to understand how national security needs and freedom of the press can be in conflict and to identify appropriate limits upon freedom of the press and speech with regard to national security.

Student Materials: "Stealth Sees the Light of Day," reading and questions, pp. 34-36, and "You Decide the Balance" worksheet, pp. 37-38.

Directions:

1. Direct the students to read "Stealth Sees the Light of Day," pp. 34-36. Respond to any questions and clarify vocabulary as necessary.

2. Organize students into groups of four and ask each group to discuss and answer the questions at the end of the reading. Each group should try to reach a consensus answer for each question. If that is impossible, minority opinions should be included when groups present their responses to the class.

3. After all groups have responded to the facts of the case and the issues in conflict (questions 1 and 2), discuss these as a class. It is important that students have a grasp of these fundamentals before progressing to the remaining questions. When all groups have completed their work, debrief the activity by discussing each question. Students should recognize that freedom of the press and national security can be in conflict. In addition, they should be aware of the dangers of both total freedom of the press as well as total governmental control of information. Finally, they should begin to develop criteria for deciding how to balance these conflicting issues.

4. Instruct the students to complete the "You Decide the Balance" worksheet, pp. 37-38. A general class discussion of each question should follow. After examining all of the situations, ask the students to analyze their responses in order to develop some general guidelines for determining what should and should not be censored.

5. Use the information provided below on national security and freedom of the press to help guide the discussions.

Legal Memorandum — National Security and Freedom of the Press:

Cases involving national security and freedom of the press have established some guidelines in this area, but much ambiguity and controversy remains. The Stealth scenario has some similarities with the 1979 case of *United States v. The Progressive, Inc.*, 486 F. Supp. 5 (D. Wisc. 1979). In that case, the Progressive published an article, based upon documents in the public domain, describing how to build an H bomb. The *Progressive* was making a statement about the proliferation of nuclear knowhow. The government sought and obtained a temporary restraining order, and the U.S. Department of Energy initiated civil litigation under the 1954 Atomic Energy Act. While the case was in the courts, another newspaper published a letter to the editor that contained much of the information that had been in the original Progressive article. At that point the government dropped its suit, leaving unresolved a variety of constitutional and legal questions.

A major issue in the *Progressive* case involved prior restraint— whether publication of a paper or magazine could be halted prior to distribution. In *Near v. Minnesota*, 283 U.S. 697 (1931), the Supreme Court recognized that prior restraint could be exercised only in extreme cases. These included: restricting obscene publications, avoiding incitement to acts of violence or overthrow of the government, and preserving national security. The majority indicated that greater latitude for prior restraint would be granted during wartime.

The Pentagon Papers case, *New York Times v. United States*, 403 U.S. 713 (1971), also dealt with the balance between national security and freedom of the press. In a series of articles, the *New York Times* began to expose the controversial history of United States involvement in Southeast Asia. Much of the information published in the *Times* came from a study compiled by the Department of Defense, which had been classified "top secret." The study became known as the "Pentagon Papers." When the articles appeared, President Richard Nixon acted swiftly to protect what he called "national security." He directed the attorney general to ask the federal district court to issue an order stopping further publication of official secrets by the *New York Times*.

A majority of the Supreme Court ruled in favor of the *New York Times*, denying the federal government's request for an order prohibiting publication of the Pentagon Papers. The Court believed that although the documents released in this case were top secret and embarrassed the government for engaging in questionable practices in Southeast Asia, they did not endanger national military security. Two justices indicated that prior restraint was never appropriate, four felt that it was permissible under certain circumstances (such as the reporting of troop movements during war) which were not met in this case, and three indicated they might have restrained publication in this case had a fuller record of the facts been available.

In *U.S. v. Heiene*, 151 F.2d 813 (2d Cir., 1945), *cert. denied*, 328 U.S. 833 (1946), a judge decided that gathering information entirely from public sources was not a crime. In *U.S. v. Scarbeck*, 317 F.2d 546 (D.C. Cir., 1963), *cert. denied*, 374 U.S. 856 (1963), a court ruled that a jury could consider only whether a document was classified, not whether it should have been. *Gorin v. United States*, 312 U.S. 19 (1941), however, indicates that a jury must determine whether the transmitted information related to national security and whether those who transmitted it acted in bad faith: i.e., had "intent or reason to believe that the information to be obtained is to be used to the injury of the United States or to the advantage of any foreign nation."

This activity was written by Dale Greenawald and was published in the Fall 1985 issue of Update on Law-Related Education, published by the American Bar Association. It is used with the permission of the American Bar Association.

Enrichment Exercise: Students could research state and federal laws that provide a framework for citizen and press access to government decision-making. Examples include (1) the Freedom of Information Act (5 U.S.C. 522), which, with certain exceptions, requires records possessed by any federal executive agency to be made available to the public, (2) the Nebraska Public Records Act (84-712 — 84-712.09), which, with certain exceptions, requires public records belonging to the state and any county, city, village, agency, etc. to be made available to the public, and (3) the Nebraska Public Meetings Act (84-1408 — 84-1414 Nebraska Statutes), which requires meetings of public bodies to be open to the public. The class might try to obtain some information utilizing the Freedom of Information Act. For a good description of the FOIA, see Harris, "What is Privacy?— F.O.I.A." in the Spring 1982 issue of *Update on Law-Related Education*, published by the American Bar Association.

Activity 3-E:
The Student Press

Purpose: To acquaint students with the conflict between the First Amendment rights of public-school journalists and the right of public school administrators to control school activities.

Student Materials: *Jefferson and Paine* v. *Liberty High School* hypothetical case, pp. 39-52.

Directions: The *Jefferson and Paine* v. *Liberty High School* case is based on a case decided by the U.S. Supreme Court, *Hazelwood School District* v. *Kuhlmeier*, 108 S.Ct. 562 (1988). That case is discussed below. There are a variety of ways of presenting this material to the class:

A.Case Study

1. Distribute all or part of the *Jefferson and Paine* v. *Liberty High School* hypothetical. (The Facts of the Case section, pp. 39-41, should be enough to give the class a flavor of the issues.) Instruct the students to read the case and discuss the questions that follow. This may be done as a classroom, small-group, or individually-guided activity.

a. What are the important facts in this case?

b. What issues are involved in this case?

c. What arguments would each side make on each of the issues?

d. If you were the judge deciding this case, how would you decide it and why?

e. Who do you believe should be ultimately responsible for the content of a school newspaper?

f. To what extent should student journalists be involved in the decision-making process regarding the content of school-sponsored newspapers?

g. What is the difference between censorship and editorial judgment?

2. Discuss with the students the U.S. Supreme Court's decision in *Hazelwood School District* v. *Kuhlmeier*, discussed below.

B. Mock Trial

1. A student-conducted mock trial can be an exciting part of any law-related education unit. A mock trial not only raises interesting legal issues, but also helps the students develop questioning techniques, critical thinking, and oral advocacy skills. It does, however, require extensive preparation.

2. Space limitations preclude the inclusion of detailed directions on how to conduct a mock trial. A complete mock trial packet containing the *Jefferson and Paine* v. *Liberty High School* case, including more extensive witness statements and exhibits, can be obtained from the Nebraska State Bar Association, P.O. Box 81809, Lincoln, NE 68501, Attention: Law-Related Education Director, 402/475-7091. For information on trial procedures which can be used to acquaint students with the key steps and actors in a trial, see Lesson 10, Activity 10-G.

3. As part of the debriefing of the mock trial experience, discuss with the class the questions posed in the case study approach outlined above, and the U.S. Supreme Court's decision in *Hazelwood School District v. Kuhlmeier*, discussed below.

C. Television Simulation

1. Invite students playing the roles of the principal characters in *Jefferson and Paine* v. *Liberty High School* to plead their case before *People's Court's* "Judge Wapner," who should be prepared to ask penetrating questions about the parties' positions — or invite the principal characters to appear together and argue their respective positions on *Nightline*, hosted by "Ted Koppel."

2. As part of the debriefing process, discuss with the class the U.S. Supreme Court's opinion in *Hazelwood School District* v. *Kuhlmeier*, discussed below.

Hazelwood School District v. *Kuhlmeier*, 108 S.Ct. 562 (1988): The facts of the Kuhlmeier case are similar to those of the Jefferson and Paine hypothetical, with some exceptions. For instance, while one of the controversial articles in the Jefferson and Paine case concerned the use of drugs and alcohol, in the *Kuhlmeier* case the article was about the impact of parents' divorces on children. Both cases involved stories about teenage pregnancy.

In a 5 to 3 decision, the Supreme Court decided in favor of the school district. The majority decision began by quoting from *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969), that students in public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." However, it noted that the Court has also held that the First Amendment rights of students in public schools "are not automatically coextensive with the rights of adults in other settings." *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986).

The Court first decided that the school newspaper had not become an open forum for public expression. If it had become a "public forum," a place dedicated for purposes of communicating thoughts between citizens, the government could not regulate its content unless it could show a compelling reason for doing so. However, the Court found that "school officials did not evince either by policy or by practice any intent to open the pages of [the school newspaper] to indiscriminate use by its student reporters and editors, or by the school body generally. Instead, they reserved the forum for its intended purpose, as a supervised learning experience for journalism students." The journalism teacher "both had the authority to exercise and in fact exercised a great deal of control" over the newspaper, and the principal reviewed each issue prior to publication. Although school board policy stated in part that "school-sponsored publications will not restrict free expression or diverse viewpoints within the rules of responsible journalism," the policy also stated that such publications were "developed within the adopted curriculum and its educational implications." "One might reasonably infer," the Court said, "that school officials retained ultimate control over what constituted 'responsible journalism' in a school-sponsored newspaper." The statement in the newspaper that it "accepts all rights implied by the First Amendment" does not reflect an intent by the administration to expand those rights by making the paper an open forum.

The Court went on to say that there is a difference between the kind of speech protected in the *Tinker* case — a student's personal expression that happens to occur on school premises — and that involved in this case — student speech in school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. The Court concluded that "educators are entitled to exercise greater control over this second form of school expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate to their level of maturity, and that the views of the individual speakers are not erroneously attributed to the school."

Therefore, "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities as long as their actions are reasonably related to legitimate pedagogical concerns."

Finally, the Court concluded that the principal acted reasonably in deleting from the paper the pregnancy article, the divorce article, and the remaining articles that were to appear on the same pages of the newspaper. For instance, the pregnancy article, even though it used pseudonyms, failed to adequately protect the privacy of the girls concerned and contained material that the principal could have reasonably believed was inappropriate in a school-sponsored publication distributed to 14-year-old freshmen and presumably taken home to be read by students' even younger brothers and sisters. The decision to delete the full pages carrying the problematic articles was reasonable given the particular circumstances of the case. The principal reasonably believed at the time that there was insufficient time to make corrections and that the newspaper had to be printed immediately or not at all.

Justice Brennan wrote a sharply-worded dissent in which he disagreed with all the majority's conclusions. He contended that the articles in question interfered with the school's pedagogical functions only in that they expressed messages that conflicted with those the school wanted the students to hear. There is no valid constitutional distinction between personal and school- sponsored speech, Brennan argued. The proper test is the Tinker test — did the expression materially disrupt classwork or involve invasion of the rights of others? If school officials feared that the viewpoints expressed in the newspaper would be wrongly attributed to the school, they could have dealt with this problem by employing means less violative of students' constitutional rights. For instance, they could have required the paper to print a disclaimer that all editorials appearing in the paper reflect the opinions of the paper's staff, which are not necessarily shared by the administration or faculty.

The majority's opinion, Brennan wrote:

> denudes high school students of much of the First Amendment protection that *Tinker* . . . prescribed. Instead of "teaching children to respect the diversity of ideas that is fundamental to the American system," and "that our Constitution is a living reality not parchment preserved under glass," the Court today "teaches youth to discount important principles of our government as mere platitudes."

__The Jefferson and Paine v. Liberty High School__ case used in this activity was adopted from a mock trial script originally written by Steve Jenkins of the St. Louis Bar Association. It was adopted for use by the Nebraska High School Mock Trial Project by Lincoln attorney Michael Gooch, assisted by Alan Peterson — a Lincoln attorney, Thomas Lansworth — an attorney who teaches journalism at Drake University, and Val Swinton — a reporter for __the Lincoln Journal__.

Activity 3-F:

The Electronic Media

Purpose: To acquaint students with the different treatment afforded the print and electronic media under the First Amendment and to raise the question whether the public has a right of access to the print or broadcast media.

Student Materials: "The Electronic Media" situations and questions, pp. 53-56.

Directions: Instruct the students to read the situations and answer the questions. Below is some background information that may be useful during class discussion.

Situation A

1. This question provides another opportunity to consider the role of the media in a democratic society. Some students may feel that the media is obligated to publicly evaluate candidates for public office. Others may feel that the media exerts too great an influence on public opinion and ought to be curbed.

The statements made by the newspaper and the radio commentator may or may not be true. In any event, the First Amendment protects the right of the press to print these kinds of statements. However, the newspaper and radio station can be sued for libel if it can be proved that their charges are untrue, that they injured the candidates' reputations, and that the attacks were made with "actual malice." (See Activity 3-C.)

2. Among the possible remedies for unfair attacks or endorsements would be laws requiring newspapers, radio, and television to provide space or air time for replies. There is much to be said in favor of such laws. The print and broadcast media can have an enormous impact on public attitudes and opinions. Fairness dictates that those directly harmed by stories, editorials, and endorsements ought to have a chance to reply. If their replies are to be heard, they must have access to the columns and airwaves of the news media. The high cost of media ownership can bar countless voices from being a part of the "marketplace of ideas" unless the public has some right of access. Requiring the media to provide access would not prevent publishers and broadcasters from printing or airing what they choose, it would only allow a right of reply to what they choose to disseminate.

The major argument against requiring access is that doing so would violate freedom of the press because what is printed or broadcast would be decided by government (which would make and enforce these laws), rather than by editors and publishers.

3. The law's answer to question #2 is different for the radio station and the newspaper. Radio and television stations are regulated by the Federal Communication Commission's [FCC] "fairness doctrine." One aspect of this doctrine, the "personal attack" rule, is that when a broadcast attacks the integrity or character of a person or group or supports or opposes a political candidate, the station must furnish the person attacked or opposed with the contents of the broadcast and offer him or her free air time to respond. In *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), the Supreme Court upheld the constitutionality of the "fairness doctrine." The Court noted that radio and television frequencies are scarce resources and are allocated to license holders as a public trust.

> It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private license.... It is the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences which is crucial here.

In contrast, when Florida passed a law requiring newspapers in that state to publish in a conspicuous place and in the same kind of type a candidate's reply to any attack made by the paper on the character or record of the candidate, the Supreme Court held that the law violated the First Amendment. The Court in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) concluded that the law intruded into the function of editors — to choose content, to determine the paper's size, to decide how to treat public issues. It is hoped that a newspaper will be fair, but even if it is not, "It has yet to be demonstrated how government regulation of this crucial process can be exercised consistent with First Amendment guarantees . . . ."

The key distinction between these two cases is that *Tornillo* dealt with newspapers, while *Red Lion* concerned the regulation of radio and television stations *that hold government licenses to use a limited number of available frequencies as a public trust*. Thus, as the other situations in this activity further point out, TV and radio have historically been subject to much greater regulation then have the print media. It is the fairness doctrine and similar regulations that make TV and radio reluctant to endorse political candidates.

It is unlikely that students will be able to generate this legal distinction on their own. Their answers will more likely focus on the size of the audience, the amount of broadcast time, and the size and placement of the newspaper articles. Ask them to compare and contrast the print and broadcast media and ask which should logically receive more government regulation. Then compare their conclusions with the law.

Situation B

1. The stations can argue that if they let the Populist Party candidate into the debate they will have to let the Socialist and Libertarian candidates in as well. The appearance of a minority party candidate will trivialize the debate and may result in fewer viewers watching. This would discourage the holding of candidate debates, which are an important service to the public.

2. The candidate can argue that she is a candidate like the others. She should be able to debate and let the public decide who is or is not worthy of their votes. The air waves belong to the public and television stations who hold licenses should not be allowed to discriminate among candidates. The candidate can publish and distribute her own newspaper and pamphlets, but she cannot put on her own TV show — or can she, using public-access cable?

3. Under the equal opportunity provision (the so called equal time doctrine) of the Communications Act, radio and TV stations are required to furnish political candidates with equivalent air time if their opponents have been furnished time. The doctrine applies only where the candidate himself or herself appears, but almost any appearance — even Ronald Reagan appearing in one of his old movies — will do. However, legitimate news coverage, including documentaries and press conferences, is exempt. Interestingly enough, because candidate debates are also exempt, the television stations would not have to invite the Populist Party candidate.

4. Clearly, furnishing air time to one major candidate and refusing to do so for the other, violates the equal opportunity requirement, as well as basic fairness. Yet, no law or regulation prevents newspapers from out-and-out favoritism. Some newspapers, like William Loeb's *Manchester* (New Hampshire) *Union Leader*, are infamous for their bias. (The Union Leader drove presidential candidate Edmund Muskie to tears.)

The validity of the distinction between the print and electronic media has been called into question. With new technology the number of radio and television stations has increased markedly. Conversely, the number of newspapers and newspaper owners has decreased, bringing about more head-to-head competition among broadcasters than among newspapers and, in the view of some, creating a crucial barrier to the diversity of opinion in the marketplace.

The Reagan administration, as part of its deregulation effort, has called for an end to the fairness doctrine and equal-time rules as well as for a streamlining of the licensing process. In August, 1987, the FCC repealed the part of the fairness doctrine that obligated broadcasters to air opposing views on significant controversies. Congress passed a law re-establishing the doctrine, but it was vetoed by President Reagan.

Situation C

1. Representatives of the radio station might argue that persons are not forced to listen to the radio — they can exercise their own censorship by turning the radio off or tuning in another station. Any effort to monitor or police the station's broadcasts would be an infringement of the freedom of expression guaranteed by the First Amendment and could result in stations being reluctant to play certain songs, comedy skits, or on-air conversations.

2. The FCC could argue that as a government regulatory agency charged with enforcing various federal laws, it has the duty to enforce the federal law that prohibits "indecent language" from being communicated by radio. The law is a reasonable one because children have access to radios which cannot always be controlled by parents.

3. Mere vulgarity is not reason enough to permit censorship of newspapers and magazines. Indeed the **Lincoln Star** gained some notoriety some years back as one of the few newspapers that published the racist and vulgar joke that eventually led to Secretary of Agriculture Earl Butz's resignation. Nevertheless, in *FCC v. Pacifica Foundation*, 438 U.S 726 (1978), the case on which situation C is based, the Supreme Court upheld the FCC's authority to regulate "obscene, indecent, or profane language over the airwaves" because of broadcasting's "uniquely pervasive presence" even "in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder," and because it is "uniquely accessible to children, even those too young to read."

Enrichment Exercise: Ask the students to consider what impact cable television and privately-owned satellite dish receivers might have on the principle that the electronic media are subject to greater regulation than the print media. Students may want to interview officials of the local cable company about laws which affect cable operators and satellite dish owners.

We the People

STUDENT MATERIALS

Activity 3-A

Freedom of the Press:
A Constitutional Comparison

Read the freedom of the press provisions of the U.S. and Nebraska constitutions.

United States Constitution, Amendment 1:

> *Congress shall make no law . . . abridging the freedom of speech, or of the press.*

Constitution of the State of Nebraska, Article I - Bill of Rights, Section 5 — Freedom of Speech and Press:

> *Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth when published with good motives, and or justifiable ends, shall be a sufficient defense.*

Questions

1. How are the two constitutions alike and how are they different in dealing with freedom of speech and of the press?
2. Why do you think the two are different?
3. Which of the two provisions do you prefer? Why?

Activity 3-B

Freedom of the Press in the Press

1. Read the following three news articles. After reading each article answer the following questions:

   a. How does this article demonstrate freedom of the press?

   b. How might this article be different if there were no freedom of the press?

2. Select one of the articles and rewrite it as if it were written in a country that did not allow press freedom. As you rewrite the article imagine that your newspaper is owned and operated by the government and that your article is to reflect only those ideas that the government wants published.

3. How might society be affected if the only news was that reported by government-owned and -operated news media?

Article 1

Judge Says He'll Release Evidence At Spy Trial

BALTIMORE (AP) — A judge said Monday that he would allow reporters to see most evidence presented in the espionage trial of a Navy intelligence analyst accused of leaking secret photographs and information to the press.

But U.S. District Judge H. Young refused to issue a blanket ruling, requested by the press, that all evidence be made public in the trial of Samuel Loring Morison. The trial is scheduled to start today.

Morison, 40, was a civilian employee with high security clearance at the Naval Intelligence Support Center in Suitland, Md. He is accused of clipping the Navy's "secret" stamp from three U.S. spy photographs of Soviet ships under construction in July 1984 and mailing them to Jane's Defense Weekly, a British military journal, in an effort to win a full-time job with the publication.

Article 2

Report: CIA Backed Blast In Nicaragua

SAN JOSE, Costa Rica (AP) — Three American journalists say rightists with CIA backing staged last year's bombing of a news conference held by Nicaraguan guerrilla leader Eden Pastora.

Pastora, head of the Revolutionary Democratic Alliance, was wounded in the bombing at La Penca, Nicaragua, on May 30 of last year. Four people were killed.

A disaffected hero of the Sandinista revolution, Pastora has resisted what he said was CIA pressure to unite his force with the larger Nicaraguan Democratic Force, or FDN. His force claims about 5,000 fighters, fighting in the south, to about 8,000 for the FDN, fighting in the north.

An 86-page report by the three journalists, issued here Thursday, said the bombing had been carried out by rightists belonging to the FDN, with the help of the CIA. The report contained no evidence to support the claim, and it was impossible to verify.

The journalists are Martha Honey, a correspondent for ABC-TV and the British newspapers London and Sunday Times; Tony Avirgan, an ABC-TV correspondent; and Dery Dayer, of The Tico Times, a Costa Rican English-language periodical. They had attended Pastora's press conference.

Honey said the journalists had first thought that the attempt on Pastora's life was an isolated terrorist act. Later, she said, the reporters found the existence of a terrorist group that had planned other killings in Costa Rica and Honduras.

She said some of the terrorist group's goals were to kill Pastora to hasten the FDN's participation in southern Nicaragua; to provoke conflicts between Costa Rica and Nicaragua and between Honduras and Nicaragua; and to launch terrorist acts against Americans with the aim of blaming the Sandinistas and provoking U.S. military intervention in Nicaragua.

Article 3

ST. LOUIS POST-DISPATCH • • Sun., Sept. 29, 1985 5A

Policy Eases Threat To Research

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WASHINGTON — Officials at the White House announced Friday that the government would not try to restrain the publication of unclassified scientific research.

The announcement eased concern among scientists that the government, in its efforts to keep sensitive technical information out of Soviet hands, would limit open communication of even the most basic research that might one day have military application. Scientists have feared that the government was moving in the direction of de facto classification of officially unclassified research.

White House officials made it clear that they were not backing away from efforts to prevent the disclosure of technical data of clear military value to the Soviet Union but were simply defining more clearly where and how to draw the line on the kinds of material to be restricted.

The announcement said that President Ronald Reagan had approved a new "national policy" that calls for the results of fundamental research — the kind that is typically performed at universities for the sake of advancing scientific knowledge — to remain unrestricted "to the maximum extent possible."

If some fundamental research has to be tightly controlled to protect the nation's security, the new policy says, then it will have to be formally classified, the established method of protecting military secrets. It cannot be restricted simply by ordering scientists not to communicate the results in meetings, publications, or conversations with foreign scientists, according to the policy.

"Our goal is to foster the free and open exchange of unclassified research so necessary to a free society and an expanding economy," the White House announcement said.

The president's action was applauded by leaders of the scientific and academic communities.

"I'm heartened because I've seen the gates close on basic research as the military has moved to restrict the flow of technologies to the Soviet Union," said Dale R. Corson, president emeritus of Cornell University. He headed a 1982 study of scientific communication and national security for the National Academy of Sciences. "I don't believe the new directive is going to solve all the problems, but a signal has been given by the president and I think it's the proper signal."

The new policy applies strictly to federally financed fundamental research that is performed at colleges, universities and laboratories and is ordinarily published and disseminated widely. The policy does not apply to industrial research and development that is geared to the design and production of products and is ordinarily restricted for proprietary or national security reasons.

Activity 3-C

Public Officials, Citizens, and Libel

New York Times v. Sullivan
376 U.S. 254 (1964)

Libel is publishing a false statement which damages someone's reputation. Most public officials, however, cannot be sued for anything they may say or write. They are fully protected by the Constitution, acts of Congress, or state constitutions and statutes for any statements which they may make in an official capacity.

While public officials cannot be sued for libel, their civilian critics can be sued, but only if public officials can prove that the statements about them were made with "actual malice" — that is, with knowledge that it was false or with reckless disregard for whether it was false or not.

A U.S. Supreme Court case, *New York Times v. Sullivan*, established this "actual malice" standard as the requirement that must be met in order for a public official to be successful in a suit for libel. In March of 1960, the *New York Times* ran a full page advertisement calling for support of blacks protesting civil rights abuses in the South. It described specific abusive incidents that had occurred in Montgomery, Alabama. For example, it said that blacks faced an "unprecedented wave of terror," and went on to describe police harassment of Dr. Martin Luther King, Jr. No specific names were mentioned. The ad cost $4,800 and was placed by a gentleman who was known to the Times as a responsible person. However, the ad contained numerous inaccuracies. For example, police had been called to a college campus, but had never surrounded it, and the campus dining hall had never been locked.

L.B. Sullivan was Commissioner of Public Affairs in Montgomery. He was responsible for supervising the police department. He claimed that some of the incidents described happened before his tenure in office. In addition, he contended that people who knew him associated him with the ad. Some had indicated that his activities threatened their friendship and that if it were their choice he would not be retained in his office. Sullivan sued the *Times* for libel.

Questions

1. What are the important facts in this case?

2. What issues must the Court consider?

3. What difference, if any, is there between writing a letter to the editor saying derogatory things about a citizen of your town and criticizing the police chief for not doing his or her duty?

4. Do you feel that Sullivan and other public officials relinquish some of their rights when they become public servants? Should they be less protected from criticism than other citizens? Why or why not?

5. Should newspapers be required to prove that all ads, articles, and editorials are true? How might such policy influence freedom of the press?

6. Should Sullivan win his suit? Why or why not?

Activity 3-C

Public Officials, Citizens, and Libel

The Case of Raymond Henderson

As leader of the local National Association for the Advancement of Colored People (NAACP), Ray Henderson was involved in fighting discrimination in his home town. He had irritated a lot of community leaders by his vigorous efforts to protect what he felt were minority rights. The current situation seemed like a lot of the others. The town council had recently fired a black secretary. Ray thought that there was only one reason for the firing — racial prejudice. At the first council meeting after the firing, Ray told the council members in no uncertain terms that he felt that the firing was "racially motivated" and he demanded that the town rehire the secretary.

This incident seems to be another example of democracy in action. An irate citizen was expressing his views to local political decision-makers. However, Ray's angry speech in the council chambers was not the end of the story. Shortly after his presentation, Ray Henderson faced a libel suit. Five members of the town council contended that Henderson had defamed their characters by using the term "racially motivated." They were suing him for $100,000.

Questions

1. Briefly describe the major events in this story.

2. List as many reasons as possible why the town council might have sued Ray. Are there any reasons for suing Ray even if the council has a weak case and may not win? If so, what are they?

3. Why do you think the council sued Ray?

4. Which of the reasons in question 2 seem to be appropriate and a proper use of the legal system? Which do not?

5. If you were Ray, how would you feel? How might this suit influence your behavior? Why?

6. How might this suit influence other people who are involved in criticizing actions of the town council?

7. How might the right of public officials to sue their critics influence public debate on political topics?

8. In the 1970s, cases like the one against Ray numbered several hundred each year. Now they are over a thousand. Many of these cases involve newspapers. How might this change influence what newspapers say about political figures? How might this influence what the public knows?

9. What are possible consequences of abolishing the right of public officials to sue their critics for libel? Consider consequences for both the public and for public officials.

10. Should there be changes in the right of public officials to sue newspapers and other critics? If so, what are they? If not, justify current practices.

Activity 3-D

A Threat to National Security or Information for the Public?

"Stealth Sees the Light of Day"

On August 8, the monthly magazine, *Masses*, published an article that described the operation of the Stealth Missile program. Officials of the U.S. Defense Department seized all copies of the edition and obtained an injunction to stop its publication. They contended that it revealed classified military secrets. *Masses* filed suit, charging that the government's action was unjustified prior restraint (seizing a publication before it is released to the public), which violates the First Amendment to the U.S. Constitution. The editor felt that citizens need to have accurate information for making decisions.

While attorneys for both sides were preparing for a courtroom battle, another magazine, *The Guardian*, acquired a copy of the original article and published it. Copies were widely distributed. The government decided to file criminal charges against the author of the Stealth article and the editors of both magazines, although it admitted that the material in the article did come from public sources. The government countered, however, that although the information in the article was available to the public, it was still classified information and, as such, was subject to the same protection accorded any other classified material.

Stealth Sees the Light of Day

The Masses

August 8, 19_____

Stealth's radar-evading technology was aptly named. It can dodge detection, allowing missiles to make out- of-nowhere entrances and exits that surprise the enemy. But the real secret of Stealth is that it relies upon mechanisms similar to the "fuzz buster" used by speed demons on every interstate in the country.

The information in this article was gathered entirely from sources readily available to anyone. It was obtained from U.S. Air Force magazines and employee brochures, from assembly-and-maintenance instructions for a fuzz buster, from books, from articles, from interviews, and from logical deductions. I am writing this article to show that no scientific technology can remain secret for long. We cannot restrict knowledge about what is basically a natural phenomenon. The secrecy around the Stealth project only allows the Pentagon to continue the arms race. American defense strategists offer Stealth as an Obi-Wan-Konobi-like miracle. They would protect us from the Malevolent Empire by restricting information, hoping to convince us that this military miracle will save us.

The truth is that Stealth is only an application of relatively simple laws of physics. The secrecy surrounding this program only hides cost overruns and keeps from the public information which would reveal our prized defense system as little more than an overgrown fuzz buster. What we should learn from this article is to become more active in promoting world peace, to keep a closer watch upon the Pentagon and its big buck spenders, and to realize that military secrets aren't secrets for long. Anyone who wants can find most of the information on most programs in easily available places.

(The remainder of *The Masses* article is devoted to a detailed description of how the Stealth system operates).

The key elements of espionage, according to the U.S. Code are:

- "Gathering, transmitting or losing defense information" with the "intent or reason to believe" that the information would be used to the injury of the United States, or to the advantage of any foreign nation;

- "unauthorized" possession of, access to, or control over any material relating to the national defense which could be used in a similar manner; and

- disclosure of classified information, "specifically designated by a U.S. government agency for limited or restricted dissemination or distribution."

Questions

1. What are the major facts in this case?

2. What issues are in conflict?

3. Review the U.S. Code concerning espionage (reprinted above). Do you think that it applies in this case, or does it just apply to individuals who directly transmit sensitive information to enemy agents?

4. List as many arguments as possible in favor of convicting the author and editors.

5. List as many arguments as possible in favor of acquitting them.

6. Should the press have an unlimited right to print information about the military? Why or why not?

7. Should the government have an unlimited right to prohibit publication of any information about the military? Why or why not?

8. What criteria would you use to help you to decide how to balance the right of citizens to have access to information versus the right of the government to maintain national security? How can you decide what should be printed and what should not?

Activity 3-D

A Threat to National Security or Information for the Public?

Worksheet

You Decide the Balance

Below is a list of topics which might be published. Which ones would you allow the press to publish, and which ones would you prohibit? Why? Be certain to explain why you feel national security or freedom of the press is more important in each case.

1.______ The location of U.S. troops during wartime.

2.______ The location of U.S. bases overseas during peacetime.

3.______ A description published in the 1980s of U.S. government policies and action in Vietnam during the 1950s and 1960s. This document is classified because it reveals that our government did many things to which most citizens would object.

4.______ A classified description of how U.S. missiles are targeted.

5.______ A classified government document describing shoddy equipment and training being provided to U.S. troops.

6.______ A classified document explaining why a major weapons system had huge cost overruns that totalled millions of dollars.

7.______ An explanation of how to build a nuclear weapon. All information came from interviews or other public sources which were not classified. Government leaders said publication of this information was a threat to U.S. security.

8.______ Publication of an autobiography describing a CIA agent's life as a spy five years ago. The book describes how U.S. agents operate.

9.______ A list of the locations of U.S. nuclear bomb plants and the amount of radioactive compounds they release into the air. Some of these plants are near major cities.

10.______ Notes taken at a closed congressional hearing into the failure of the U.S. intelligence community to be prepared for an attack upon a U.S. military base overseas.

Activity 3-E

The Student Press

Jefferson and Paine v. Liberty High School

The Facts

In late January, 19—, students enrolled in the Liberty High School Journalism II class met with their teacher to review plans for the March-May monthly issues, as well as the special senior class issue of the school newspaper, *The Liberty Line*. *The Liberty Line* is a school-sponsored newspaper at Liberty High, produced and published monthly, primarily by students enrolled in the Journalism II class. Liberty is a public high school, grades 9-12, with an enrollment of approximately 1,500 students.

Students in the Journalism II class have completed Journalism I. Journalism I and II are each full-year courses at Liberty High. In Journalism I, according to the school's Curriculum Guide, students are taught the "principles of reporting, editing, layout, publishing and journalistic ethics." In Journalism II, students continue to receive instruction on topics relevant to newspaper journalism. As described in the Curriculum Guide, "Journalism II provides a laboratory situation in which students publish the school newspaper applying skills they have learned in Journalism I."

The Journalism II course had been taught by Bobbi Bernstein, a veteran language arts teacher at Liberty High School. From among the Journalism II students, Bernstein selected the editor, assistant editor, layout editor, and layout staff of the *Line*. Students, using Bernstein as advisor and teacher, scheduled publication dates and deadlines, decided the number of pages for each issue, assigned story ideas, assisted in story development, reviewed the use of quotations, edited stories, adjusted layouts and selected letters to the editor. Bernstein was responsible for submitting a draft of each issue to the principal for review before sending it to the printer. Superintendent Jo Upright informed Principal Chris Obey that board policy should not be questioned in *The Liberty Line*. The principal rarely made changes in draft copies. Most corrections or revisions were handled by Bernstein and students after reviewing page proofs prepared by the printer.

At the January Journalism II planning meeting, Bernstein and the students decided to focus on some timely topics of concern to teenagers — "drug and alcohol use and abuse," and "teen pregnancy." For the May issue, students were assigned to do background articles on these topics. Student editor Tony Paine submitted a request to write an editorial on drug and alcohol abuse. Bernstein approved Paine's idea and asked to see a draft copy by April 8, 19—.

Jan Jefferson, a student, consulted Bernstein about contributing some interview material on students who are or were pregnant.

Students researched, wrote, reviewed and revised their assigned stories. By April 15, they had a fairly firm layout for the May 5 issue of *The Liberty Line*. The following articles and editorial were laid out on pages four and five of this issue:

"A National Epidemic: Teen Pregnancy and Abortion"

"Pregnant Teens and New Moms Tell Their Stories"

"SADD and JUST SAY NO: Teens Respond to Drug and Alcohol Abuse"

"Editorial: Gusto and Smoke-Filled Logic"

On April 11, 19—, Bernstein gave Liberty School District a two-week notice stating that Bernstein would be leaving the district. Bernstein had accepted a job as a full-time professor of journalism at Drake University. Bernstein had been teaching journalism part time at the University of Nebraska.

Bernstein was asked by the Dean of Drake Journalism School to report to the new job by May 1. Bernstein informed students of the career change on April 15, but assured students that the May 5 issue and their plans for selling the paper should go on as usual.

Students began plans to promote the May issue of the *Line*. They made banners highlighting articles (e.g., "Teenage Pregnancy, — Buy the Line"). Banners were hung, as usual, in the school cafeteria. The student journalists assumed all was well. They were waiting for the published edition to sell it to the student body.

On April 16, Bernstein submitted a copy of the May issue to Principal Obey with a note attached: "Taking copy to printer to get page proofs — please respond as soon as possible." Bernstein did not hear from the principal about the May issue. On April 21, the principal informed Bernstein that the debate teacher, Pat Henry, would take over *The Liberty Line* temporarily. Henry had a full teaching schedule and was not qualified to teach Journalism I and II, but agreed to take care of getting the May issue printed and to help students sell the paper. Obey told Bernstein that a substitute teacher would be used to teach Bernstein's classes through the end of the school year. Bernstein talked with the substitute about helping with the last two issues, but the substitute did not have any newspaper background.

The page proofs were returned to Bernstein from the printer on April 22. Bernstein gave copies to the editor and assistant editor for proof reading. Bernstein also gave a copy to Principal Obey and Pat Henry. Bernstein reminded Henry to check with the principal before final printing. Bernstein left Liberty High School on April 25. On April 29, Henry took the corrected page proofs to the printer. Henry had not received any corrections or comments from the principal. Henry called Principal Obey from the printer's office, asking if the May issue was all right. Henry said the call was coming from the printer's office. Principal Obey asked Henry to hold while Obey reviewed the page proofs. In a few moments Obey returned to the phone and informed Henry that the article containing interviews with pregnant teens and teen mothers as well as the editorial should be deleted. Henry said it would be difficult to reset the layout with only those deletions and still get the issue out by May 5. The principal told Henry to make it easy on the printer and just delete all of pages four and five. Henry followed the principal's orders and told the printer to delete those pages. Nothing more was said on the matter.

The published edition of the May issue of *The Liberty Line* was delivered to the school the morning of May 5. Journalism students picked up the *Line* from the office and began selling them in advisory rooms. Some student journalists observed that their articles were missing. They went to Henry, who informed them of Principal Obey's orders. Led by Paine, students marched to Obey's office and demanded to speak with the principal.

Principal Obey met with students and explained the decision to delete the pages. Obey reminded students that *The Liberty Line* is a school-sponsored publication and part of the Journalism II course, governed by school board curriculum policy. Obey informed students that school board policy gives building principals final authority on the content of school-sponsored publications. Furthermore, the school district provided almost three-fourths of the cost of production and publication, while the 25 cents per issue selling price only provided about one-fourth of the newspaper budget. Obey said the interviews might provoke problems in light of Superintendent Upright's proposed policy to remove pregnant students from the regular high school program. The principal also said the editorial was inflammatory and could cause disruption among students and, in general, was destructive of efforts to combat drug abuse.

Students Jefferson and Paine filed suit in federal court.

School Policies

The Liberty Line: Statement of Policy

The Liberty Line is a school funded newspaper, written, edited, and designed by members of the Journalism II class with assistance of advisor Bernstein.

The Liberty Line follows journalism guidelines that are set by the Scholastic Journalism textbook, . . . The Liberty Line as a student-press publication, accepts all rights implied by the First Amendment of the United States Constitution which states that: "Congress shall make no law restricting . . . or abridging the freedom of speech or the press . . ."

That this right extends to high school students was clarified in the *Tinker v. Des Moines Community School District* case in 1969 (393 U.S. 503). The Supreme Court of the United States ruled that neither "students nor teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Only speech that "materially and substantially interferes with the requirements of appropriate discipline" can be found unacceptable and therefore prohibited.

The "Statement of Policy" is published in the first issue of The Liberty Line at the beginning of each school year.

Liberty School Board Policy 939, "School-Sponsored Publications"

School sponsored student publications will not restrict free expression or diverse viewpoints within the rules of responsible journalism. School sponsored publications are developed within the adopted curriculum and its educational implications and regular classroom activities.

Students who are not in the publications classes may submit material for consideration according to the following conditions:

a. All material must be signed.

b. The material will be evaluated by an editorial review board of students from the publication classes.

c. A faculty-student review board composed of the principal, publications teacher, two other classroom teachers and two publications students will evaluate the recommendations of the student editorial board. Their decision will be final.

No material shall be considered suitable for publication in student publications that is commercial, obscene, libelous, defaming to character, advocating racial or religious prejudice, or contributing to the interruption of the educational process. The school administration has the final authority and responsibility regarding the content of school-sponsored student publications.

Liberty School Board Policy 838, "Controversial Issues"

It is the responsibility of the principal and teacher to see that the controversial issues discussed in the classroom and relevant to the course of study, limited to the level of understanding and age group of the student, and maintained within the bounds of objectivity commonly acceptable to the community.

The student shall have rights during these discussions.

Specifically, the student shall have:

a. The right to study any controversial issue which has political, economic, or social significance, and concerning which (at his/her level) he/she should begin to have an opinion.

b. The right to have access to all relevant information, including the materials which circulate freely in the community.

c. The right to study under competent instruction in an atmosphere free from prejudice and bias.

d. The right to form and express one's own opinions on the controversial issues without, thereby, jeopardizing the relationship with the teacher or with the school.

STATEMENTS OF THE PRINCIPAL CHARACTERS

Tony Paine

My name is Tony Paine. I am a senior at Liberty High and am editor of *The Liberty Line*. I'm a good student. I've carried an "A" average in most of my courses at Liberty. I plan to go to Doane College on an academic scholarship. I want to study at Doane's School of Journalism. I hope this case doesn't cause problems with my plans.

Writing editorials was the best part of my job. Everyone around Liberty knows I am quick to give my opinion on just about any issue. I remember the explosion after my editorial attacking the new "no pass, no play" school board policy. I said the policy was unfair, discriminatory, narrow-minded, and maybe even racist. With so many of Liberty's administrators coming from a coaching background, I wrote: "If 'no pass, no play,' had been the policy when Liberty's administrators were in high school, including Upright, probably half of them would have not made it to college because they would have not had an opportunity to get an athletic scholarship." The superintendent went through the roof and issued a new regulation stating that school board policy was not to be questioned in school-sponsored publications. Furthermore, Bernstein told us that, under the new regulation, Bernstein would have to submit a copy of *The Liberty Line* to the principal for review before final publication.

I thought the May issue was going to be dynamite. I had written an editorial called "GUSTO AND SMOKE-FILLED LOGIC." In it I wrote:

> Today's news is full of horror stories about the use and abuse of illegal drugs, especially crack.... There are calls for mandatory drug testing, even testing all students; for giving police greater authority to conduct searches and seizures; and for judges to give even longer sentences for drug-related crimes....
>
> If you dare question the accuracy or motives behind this current crusade, you fear being labeled soft on crime, or even worse, portrayed as a pot smoking, coke snorting dope head.

> But let's be serious — you don't have to be a burn out or a cynic to see the hypocrisy. Are crack and marijuana really the greatest dangers facing our generation? In addition to the aura of nuclear annihilation being ever present, we only have to turn on the tube or glance at the back of most magazines and we come face to face with two of our biggest killers — alcohol and tobacco. The ads bombard and encourage us to "Go for the Gusto," "Head for the Mountains," "Get a Taste of It," while reminding our female population "You've Come a Long Way, Baby."
>
> * * * *
>
> If those in power really want to "save us," why not outlaw the use of tobacco and alcohol also? While these sanctimonious adults attend their cocktail parties in smoke-filled rooms, and pat themselves on the back for their anti-drug crusade, they should pause and give serious thought to this message: Don't preach to us until you can practice stomping out all harmful substances — including the powerful interests promoting the use of alcohol and tobacco. If you don't want to be serious, then don't be hypocrites — legalize, regulate, and tax it all. Then all of us would have to make an informed choice as to whether we want to harm our bodies, ourselves!

You can imagine how I felt when I realized that two whole pages, including my editorial, had been deleted. I contacted Bernstein about the situation. Bernstein said I could always make my own copies of the editorial and articles and distribute them outside classtime. It was a great idea. We made some copies and gave them out without interference. But it still wasn't like using our own forum, *The Liberty Line*. That is why we came to court — for recognition of our First Amendment rights. The articles and editorial were intended to educate and enlighten students. A free press is the cornerstone of democracy.

Jan Jefferson

My name is Jan Jefferson. I am a junior at Liberty High School. I have not taken Journalism I, but occassionally write articles for *The Liberty Line*.

When I heard that the May issue was going to be about teen pregnancy, I volunteered to write an article from the pregnant student's perspective. Given the sensitive nature of this story, I was very careful to follow proper journalistic guidelines. I secured consent from each of those interviewed, and, to protect their privacy, I used pseudonyms, changing the names of students in the actual article. I also had each of those interviewed read and initial the section of the article about them, verifying that section was accurate.

I submitted my first draft of the article to Bernstein on April 1. Bernstein returned the draft on April 4 and told me to delete two interviews because there would not be enough room to print all five interviews. I was allowed to choose the three interviews for the article. Bernstein didn't say much about the content of the interviews. I talked with some of the other students on the newspaper staff about the need for students to learn from other's experiences and, that maybe, the interviews would open some students' eyes and minds to the problems of teen pregnancy.

Deleting the article seems so unfair. Mr. Obey never gave us an opportunity to tell our side of the story. Mr. Obey should have talked with us and given us a fair hearing before deleting the pages.

Bobbi Bernstein

My name is Bobbi Bernstein. I am currently living in Des Moines, Iowa. I am an assistant professor of journalism at Drake University. I was on the teaching staff at Liberty High. I have an extensive background in education and journalism. The students I worked with on *The Liberty Line* were terrific and, with their

dedication and leadership, I think we made *The Liberty Line* an exceptional high school newspaper. The *Line* won several awards for excellence in journalism — even some from Sigma Delta Chi, the Society of Professional Journalists — for our investigative reporting on controversial topics.

Of course, controversy creates conflict. There have been times when school board members and the superintendent have received calls complaining about the content of some articles and editorials in *The Liberty Line*. I only heard about the calls because Principal Obey sometimes would inform me that they had received a call from Superintendent Upright about some calls Upright had gotten from parents. Of course, I also heard good comments from parents, other teachers, and students.

I will never forget the near hysteria over Paine's editorial questioning Liberty's new "no pass/no play" policy. The superintendent was in Obey's office ranting and raving when I arrived. Upright said there had been enough problems with coaches and athletes accepting the new policy and there was no need for some smart aleck kid bad-mouthing board policy and attacking administrators. Upright informed Obey that there would be a new regulation regarding all school-sponsored publications and, from now on, all school-sponsored publications, including *The Liberty Line*, would have to be submitted to the building principal, Obey, before final printing and distribution. I protested, but to no avail.

The only time Obey altered an issue was when Paine criticized the board of education's newly approved sex education course. The board had decided to omit any reference to abortion and contraceptives in the course. Paine wrote an editorial accusing the board of behaving like ostriches with their heads in the ground, trying to hide from a reality students already confront. I complained about Obey's changes in Paine's editorial, reminding the principal of *The Liberty Line's* annual "Statement of Policy" that the paper "accepts all rights implied by the First Amendment," and that Superintendent Upright's policy clearly violates the *Line's* stated policy. Obey reminded me that the superintendent was still our boss and that to defy Upright's policy would be an act of insubordination.

I realize that I had a lot of responsibility in supervising the publication of the *Line*, but it has been my intent as the paper's sponsor to nurture greater student involvement in all aspects of production. I encouraged students to participate by selecting story topics, being creative, and exercising their critical thinking skills. I am proud of the students' work, and I am very sorry about the administration's actions censoring the May 5 issue.

Jo Upright

My name is Jo Upright. I am superintendent of Liberty School District. I have been superintendent for more than fifteen years. Before becoming superintendent, I was principal of Liberty High School for six years.

Bobbi Bernstein brought a strong academic background to our journalism courses. Bernstein also changed *The Liberty Line* from the days when I was principal at Liberty. During that time, *The Liberty Line* sometimes would cover events outside the school, but only peripherally. For example, there was an excellent article with interviews of students who had fathers and brothers serving in Vietnam. It was sensitive and informative, not provocative. For the most part, the *Line* was shorter in length, usually only four pages, covering the major happenings in school — student council, homecoming, dances, sports, etc.

Working with Liberty's legal counsel, we developed school board policies that reflected the careful wording of the *Tinker* case in regards to "School Sponsored Publications" and "Controversial Issues." Clearly, there are limits on free speech for adults and students. And, the courts have consistently recognized that schools are special places where students' free speech rights are subject to more stringent guidelines than those applying to adults in public places.

In developing the school board policy on school-sponsored publications, we sought to balance free speech interests with the need for administrative control of the school environment and curriculum. Some of the articles, particularly a couple of the editorials in *The Liberty Line*, went over the line; the balance was thrown off. I would hear about it from parents and board members. Remember, the district needs to be sensitive to parents and the community — we depend on them to support the school system.

The current conflict over the May 5 issue is not new. I remember when I had to recommend that the school board add a sentence to Board Policy 939 in an effort to minimize some of the disruption being caused by Paine's editorials. As you know, the "no pass/no play" policy being adopted in various school systems has met with some faculty and student protests. We had our share at Liberty when the new policy was proposed and adopted. When Paine's editorial appeared, we had all kinds of problems. Student athletes showed up at the next board meeting quoting from the editorial and asking about our administrators' high school grade point averages. Several administrators told me they were bugged by students asking how they got through school, what were their G.P.A.'s, etc.

After this incident, we adopted the new policy. I sent out a directive stating that all school-sponsored publications should be reviewed by building principals before final printing and dissemination. In the case of *The Liberty Line*, this meant that Principal Obey had the responsibility to review and, when necessary to keep with board policy, revise each issue. Remember, *The Liberty Line* is published as part of the adopted curriculum of the Journalism II course. If, in Principal Obey's judgment, the articles or editorials exceed the adopted curriculum guidelines, or if they go beyond the bounds of acceptable discourse, or if they may disrupt the normal educational process, the principal may impose limits and make necessary revisions.

In the May 5 issue, Principal Obey exercised that authority. As the building administrator and instructional leader for the high school, I support that action.

Chris Obey

My name is Chris Obey. I am the principal of Liberty High School. This is my eighth year as principal. Before becoming principal, I was assistant principal at Liberty for four years. I have seen the *Line* win numerous awards over the years — some before Bernstein joined the staff and some during Bernstein's time as journalism teacher and newspaper sponsor. Bernstein did take some bold steps with the newspaper. I recently reviewed many of the issues from the last five years. We had articles on teenage dating and marriage, the effects of television on children, school desegregation and race relations, school busing, the death penalty, teenage runaways, child abuse and neglect, religious cults, the draft, students' use of drugs and alcohol, search and seizure in public schools, political refugees, and even our local "no pass/no play" policy. Most of those articles summarized national stories, surveys and research, and news trends. Those stories may not have been my selected topics for a school-sponsored newspaper, but I know many of those areas are newsworthy items covered in Journalism I and II in a responsible manner. The *Line* still carried a large number of traditional articles of interest to student readers — sports, interviews with faculty members, prom news, homecoming, dances, movie reviews, etc. On some occasions, we had problems — calls from the superintendent, parents, etc.

As I mentioned, when students produced stories that sparked controversy, sometimes I was called on the carpet by Superintendent Upright. The superintendent would inform me about phone calls Upright had received from irate parents complaining about this or that article in the *Line*. Sometimes I was called directly.

I informed Bernstein about some of the complaints. Bernstein told me to tell them all to send their thoughts to "Letters to the Editor." Can you imagine a parent writing a letter to the editor to complain about an article in the school newspaper? I told Bernstein that parents could voice their dissatisfaction in other ways — like refusing to vote for school issues in the next election.

I informed Bernstein of the new guidelines when they were adopted and, although he complained, he complied and submitted issues in advance for review. In all the reviews, I changed only one line from one editorial criticizing the new sex education program adopted by the school board. That is, until the May 5 issue. After reviewing pages four and five, I was quite concerned that two pieces might cause serious problems and disruptions.

First of all, Jefferson's interviews, while attempting to respect the privacy of those interviewed, would open the door to rumor and gossip. With all my hands-on administrative experience, I know how these things happen. Students would be whispering in classes, pointing fingers, passing notes, speculating as to who the mothers and fathers might be — big problems could occur. The school doesn't need this type of disruption, or possibly even lawsuits over invasions of privacy. Besides, the article's references to sexual activity and birth control were inappropriate for some of the younger students at the school. Then there was Paine again, this time suggesting that the school board might initiate a mandatory drug testing program. To the best of my knowledge, the board is not even considering such a policy. I know that if I had not deleted Paine's editorial, students would have been in an uproar.

Also, time was a factor in my decision. With changes in staff and everything, there was not enough time to delete portions of pages four and five and still get the issue out by May 5. I had to make an administrative decision, so I informed Henry to have the printer delete all of four and five. I almost had forgotten about the deletions until I saw Paine and other students coming to my office on May 5. I quickly realized what they wanted and invited them into my office to explain my decision. Some of the students still were upset but seemed to understand. Jefferson said it was unfair of me to delete the articles without hearing students' side of the story. I said, "I didn't see the fathers' side of the story in your article, Jefferson." Jefferson replied that the story was different.

I am strongly opposed to censorship. I would not prohibit students from expressing their opinions. I think this was demonstrated by the fact that Paine and Jefferson made copies of their article and editorial and distributed copies to students the last week of school. Since they did not interrupt class time, we did not interfere with their actions. We encourage all of our students to consider diverse viewpoints and reach informed opinions.

Terry Guttenberg

My name is Terry Guttenberg. I am managing editor of *The Daily Metropolis*. I also am completing my second four-year term on the Liberty School Board. *The Liberty Line* is a product of the Journalism II course and subject to curriculum guidelines as established by the school board. The *Line*, the course curriculum, and instruction are governed by school board policy. I was the school board's consultant on curriculum and policy guidelines. Policies on "School-Sponsored Publications" and "Controversial Issues" were intended to strike a balance between an individual's freedom of expression and the need to maintain an optional school learning environment with proper administrative supervision.

Striving to maintain this balance is an on-going challenge. For example, the school board had to consider interruptions and problems caused by the editorial attacking the board's new "no pass/no play" policy. Even our board meeting was disrupted by students asking how some of Liberty's administrators made it through school, what their grade point averages were, etc.

I recommended that the board adopt a new policy explicitly giving the school administration final responsibility and authority for supervising the content of school-sponsored student publications. The board passed the new policy. As a managing editor, I can identify with the building administrator's responsibility. Under this policy, a building administrator, like Obey, must review each issue and consider whether content is appropriate and even assess the possible impact of certain stories and editorials. In some cases, the principal may have to suggest revisions or even make them to meet deadline.

Naturally, an administrator needs to set reasonable deadlines so a proposed publication can be reviewed before the printer gets it. Also, by setting deadlines early enough, the administrator insures that the editor and reporters can be heard before any deletions are made. Finally, early deadlines allow deleted material to be replaced so layout and format standards are respected.

Students need to learn the limits of free speech and press in a responsible society. We also are accountable to parents, to taxpayers, and the larger community to provide a wholesome, healthy educational environment. After all, *The Liberty Line* is sold beyond school. We sell copies for the school using *Metropolis'* distribution system. If the *Line* upsets the community, voters will not support schools. We must be cognizant of community standards.

Legal Issues

The following are some of the legal issues presented in this case:

1. Is The Liberty Line a forum for public expression?

The First Amendment prohibits the government from abridging the speech of citizens. Therefore, it is logical that citizens should be able to use government-owned or -controlled areas for communication with few restrictions. Free speech doctrine distinguishes between three types of public property:

a. the traditional public forum — parks, streets, and other sites that have historically provided a place to discuss views. The government cannot regulate expression in traditional public forums unless it can show that it has a compelling reason for doing so.

b. designated public forums — places that are not traditional public forums, but have become public forums because government "by policy or by practice" has intentionally opened the area to open public discourse. Once opened, the designated area is treated like traditional public forums for First Amendment purposes.

c. nonpublic forums — property owned by the state, but used for a specific purpose not compatible with open use by the public, such as a prison or a military base. Here the state has broadest control over the property use and the regulation of speech on it.

Have the school officials made *The Liberty Line* a public forum?

2. What is the proper standard for determining when a school may limit student expression in a school-sponsored student newspaper?

In *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969), the U.S. Supreme Court held that school officials could not prevent students from wearing black arm bands to protest the Vietnam War

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unless school authorities had reason to believe that such expression would "substantially interfere with the work of the school or impinge upon the rights of other students." The Court concluded that students in public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

The Court has also recognized that First Amendment rights of students in public schools "are not automatically coextensive with the rights of adults in other settings," and must be "applied in light of the special characteristics of the school environment." In *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), the Court held that a student could be disciplined for having delivered a speech that was "sexually explicit," but not legally obscene at an official school assembly, because the school was entitled to "disassociate itself" from the speech in a manner that would demonstrate to others that such vulgarity is "wholly inconsistent with the 'fundamental values' of public school education."

Is there a difference between a school's authority to silence a student's personal expression that happens to occur on school premises and its authority to control school-sponsored publications?

3. Did the principal have sufficient reason to order the articles deleted from *The Liberty Line*?

Activity 3-F:

The Electronic Media

Read the following situations and answer the questions:

SITUATION A

A presidential election will soon be held. In addition to the candidates nominated by the major parties, several minor party candidates are also running. One such candidate represents the National Left-Wing Party. When she speaks in western Nebraska a local newspaper carries a front page editorial headlined "Communist Traitor to Speak." Another candidate is the nominee of the National Right-Wing Party. After he speaks in eastern Nebraska a local radio commentator calls him a "racist hate-monger." Both candidates are very upset by these attacks on them, which they consider untrue. The Left-Wing Party candidate demands that the newspaper print on its front page a letter she has written explaining that she is neither a communist nor a traitor. The Right-Wing Party candidate demands that the radio station furnish him free air time so he can explain that he is neither a racist nor a hate-monger. Both the newspaper and the station refuse to honor these requests.

Questions

1.Should newspapers, magazines, radio, and television be allowed to criticize or endorse candidates for public office?

2.Should the newspaper and radio station be required to provide space and air time to allow the candidates to reply?

3.Are there any reasons why the answer to question #2 should be different for the radio station and the newspaper? In answering the question think about the following: In the weeks prior to the most recent presidential election most of the newspapers in Nebraska endorsed one or the other of the major candidates in their editorial pages. Few, if any, of the state's radio or television stations endorsed a candidate. Why was this?

SITUATION B

It is one month before the election for U.S. Senator. Running are candidates from the Democratic, Republican, Socialist, Populist, and Libertarian parties. A group of television stations decides to invite the Democratic and Republican candidates to a debate that will be telecast across the state. The Populist Party candidate demands that she too be invited to the debate and asks a federal court to prevent the debate from being aired without her presence. She does not expect to win the election, or even come close, but she sees the campaign as an opportunity to educate the voters on the Populist Party platform. The debate will be a good way to accomplish this goal.

Questions

1.What are the arguments that the stations have for not inviting the Populist Party candidate?

2.What arguments does the candidate have for her demand that she be allowed to appear?

3.Should the television stations be required to allow her to debate if the Democratic and Republican candidates debate?

4. What if a television station provided extensive free air time to the Democratic candidate, but refused to give or sell any time to the Republican candidate? Should the station be required to give the Republican equal time? Should newspapers be required to give the Republican and Democratic candidates equal space?

SITUATION C

A well known comedian recorded a twelve minute monologue entitled "Filthy Words." The recording was made before a live audience in a California theater. The recording begins with the comedian explaining his thoughts about the "words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever." The comedian then begins to list all of the "filthy" words, saying them over and over again in different contexts. The recording indicates frequent laughter from the audience.

One afternoon an FM radio station broadcast the "Filthy Words" monologue. A man, who stated that he heard the "Filthy Words" broadcast while driving with his young son, wrote a letter complaining to the Federal Communications Commission (FCC) that he could not understand how the FCC could permit such a broadcast "over the air [waves] that, supposedly, you control."

The FCC investigated the matter and informed the station that it had broken federal law by broadcasting "indecent language" and that the broadcast could contribute to the station's license not being renewed.

Questions

1. What arguments does the station have supporting its right to play the monologue?

2. What are the arguments the FCC has for prohibiting this type of speech?

3. Should the FCC have the power to regulate this type of speech on radio and television? Briefly explain your reasons.

We the People

THE BILL OF RIGHTS:

A Law-Related Curriculum for High School Students

Lesson 4:
Free Press/Fair Trial

Written by

Steve Jenkins
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We the People

A project of
The Bill of Rights in Nebraska

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Funding for this project is provided by a grant from the Nebraska Committee for the Humanities, an affiliate of the National Endowment for the Humanities and grants from the Cooper Foundation, the Walter Scott Jr. Foundation, the Robert Veach Foundation, and the Winthrop and Frances Lane Foundation.

TABLE OF CONTENTS

Lesson 4: Free Press/Fair Trial

Introduction. 6

Goal. 7

Objectives. 7

Activities. 7

Media Resources. 8

Teaching Instructions

Activity 4A: Contaminated Jury. 10

Activity 4B: The Case of Sam Nusworthy. 17

Activity 4C: Gag Orders and Press Bars. 18

Activity 4D: Reporter's Privilege. 19

Activity 4E: Television Coverage in the Courtroom. 21

Student Materials

Activity 4A: Juries in Nebraska. 23

Activity 4B: The Case of Sam Nusworthy. 27

Activity 4C: Gag Orders and Press Bars. 28

Activity 4D: Reporter's Privilege. 30

Activity 4E: Television Coverage in the Courtroom. 32

BILL OF RIGHTS
CURRICULUM EVALUATION
HIGH SCHOOL

We the People

Teacher ____________________

School ____________________

Grade ____________________

Lesson taught ____________________

A. **Please rate your degree of agreement/disagreement with the following statements:**

	Totally Agree				Totally Agree
1) The lesson was well suited to my students' conceptual level.	1	2	3	4	5
2) The lesson provided new information.	1	2	3	4	5
3) The lesson presented concepts and information in a better manner than do traditional texts.	1	2	3	4	5
4) The lesson meshed well with our course outline for the semester	1	2	3	4	5
5) I personally learned something from the lesson.	1	2	3	4	5
6) The materials were complete enough for good presentation.	1	2	3	4	5
7) I feel the lesson will be thought provoking for students (stimulate out of class thought & discussion).	1	2	3	4	5
8) I can pick up on the lesson in subsequent classes.	1	2	3	4	5
9) I think the lesson challenged some students' attitudes.	1	2	3	4	5
10) The lesson incorporated, built upon material we have already covered.	1	2	3	4	5
11) I was able to use the lesson *as is*.	1	2	3	4	5
12) I *adapted* the lesson in my presentation.	1	2	3	4	5
13) I would consider using more such materials in my classes.	1	2	3	4	5
14) I feel the materials are deficient in some way.	1	2	3	4	5

Please respond to the questions on the next page also.

Mail completed form to:
Alan Frank, University of Nebraska, College of Law, Lincoln, NE 68583-0902

B. Please answer the following:

1) Describe students' reaction/participation to this lesson:

2) What do you consider the best point of this lesson/activity?

3) What suggestions do you have for adapting or modifying this lesson/activity?

4) Were the materials adequate? How could they be improved?

Lesson 4
FREE PRESS/FAIR TRIAL

We the People

INTRODUCTION

Many legal controversies, and certainly the vast majority of cases that make their way to the United States Supreme Court, do not involve wrong versus right, but rather a clash between rights. Each side can point to important legal and social principles that will be furthered by deciding the controversy in its favor. It is the courts' task to resolve these conflicts in a manner which is most consistent with fundamental fairness and which is least destructive to our basic precepts.

This lesson on the rights of free press and fair trial exemplifies this clash of rights. The First Amendment says that government shall make no law abridging freedom of the press. The Sixth Amendment declares that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . ." The conflict between these two important rights is an historic one. John Adams had the difficult task of defending British soldiers charged with homicide for firing into a crowd of Boston demonstrators. That this incident was called the Boston Massacre demonstrates the prevailing public sentiment at the time. In 1807 Chief Justice John Marshall, presiding as the trial judge in the treason trial of Aaron Burr, took great care to select a jury that could render an impartial verdict despite potentially prejudicial pretrial publicity. The pervasive technology of the modern news media has only exacerbated these problems.

How can a defendant in a criminal trial be protected from news accounts before and during the trial that might prejudice jurors against the accused without violating the press' and the public's First Amendment rights? Is a news reporter's right to protect the confidentiality of his or her sources an indispensable component of a free press? Would televising trials add to the people's right to know or simply create a media circus? These issues which face courts, legislatures, lawyers, and journalists are addressed in this lesson.

This lesson has been placed immediately after the lesson on Freedom of the Press. Perhaps it is better taught after consideration of the Sixth Amendment. That is left to the judgment of the teacher. More information on the topic of this lesson can be found in the chapter on Freedom of the Press in *A Non-Lawyers Guide to the Bill of Rights* prepared by The Bill of Rights in Nebraska Project.

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GOAL

To understand the conflict that often occurs between the fundamental freedoms of a free press and of a fair trial.

OBJECTIVES

As a result of this lesson, students will be able to:

1. Analyze the conflict between the right to freedom of the press and the right of an accused to receive a fair trial before an impartial jury *(Activities 4-A, 4-B, 4-C)*.
2. Analyze a reporter's right to protect his or her news sources *(Activity 4-D)*.
3. Evaluate whether cameras ought to be allowed in courtrooms *(Activity 4-E)*.

ACTIVITIES

	Teaching Instructions	**Student Materials**
Activity 4-A. Contaminated Jury	10-16	23-26
Activity 4-B. The Case of Sam Nusworthy (enrichment)	17	27
Activity 4-C. Gag Orders and Press Bars	18	28-29
Activity 4-D. Reporter's Privilege	19-20	30-31
Activity 4-E. Television Coverage in the Courtroom (enrichment)	21	32

MEDIA RESOURCES

(Reprinted in part from *This Constitution: A Bicentennial Chronicle*, Summer 1986, published by Project '87 of the American Historical Association and American Political Science Association.)

FREE PRESS/FAIR TRIAL

This film reports in depth on the dilemma of balancing First Amendment guarantees of an uninhibited press and the public's right to know with the Sixth Amendment's guarantee of a defendant's right to a speedy and fair trial by an impartial jury. Film clips from the trials of Bruno Hauptman, Dr. Sam Sheppard, Billie Sol Estes, and Wayne Henly, Jr., plus clips of Nixon and Agnew claiming press prejudices, are included. WNET/Teaching Film Custodians, 1973, 30 minutes, black and white.

FREE PRESS VS. FAIR TRIAL BY JURY: THE SHEPPARD CASE

The conflict between the rights of the press and the rights of the accused to a fair jury trial are explored in this film. The 1954 case involving major constitutional issues and the 1966 Supreme Court decision establishing guidelines to protect the accused from prejudicial publicity are presented by documentary materials on the case. From *Our Living Bill of Rights* series, Encyclopedia Britannica Educational Corp., 1969, 30 minutes, color.

NEW TESTS OF THE FIRST AMENDMENT

Does the First Amendment protect people who falsely yell "fire" in a crowded theater, the confidentiality of reporters' sources of information, and speakers who advocate violent overthrow of the government? This multimedia program explores the legal implications of recent Supreme Court rulings on these and other issues, such as banning of the press from courtroom hearings, and news articles which reveal military secrets. Have these rulings changed the fundamental freedoms of speech, press, religion, and assembly guaranteed by the First Amendment? *New York Times*, 1980, sound filmstrip, color.

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TEACHING INSTRUCTIONS

Activity 4-A:

Contaminated Jury

Purpose: To acquaint students with the potential effects of prejudical publicity on a trial.

Student Materials: "Juries in Nebraska," pp. 21-22, (given all students), "Should the jury system be abolished?", p. 23, (given to half of the students), "Some information on the case you are about to hear:", p. 24, (given to the other half of the class).

Directions: In this activity the students act as jurors in a murder case. Prior to hearing the case, half the class has been exposed to information that is prejudicial to the defendant. The students then explore what effect this publicity had on their verdicts.

1. Prior to the class for which this activity is scheduled, tell the students that they will be studying the right to trial by jury and that they will soon be asked to sit on a mock jury. Hand out the material on "Juries in Nebraska" to be read by the students at home or in class. One-half of the class should also receive the page titled "Should the jury system be abolished?" The other half should receive the page titled "Some information on the case you are about to hear:" These pages should be attached to "Juries in Nebraska" in such a manner that the two packets are indistinguishable.

2. Before the "trial" divide the classes into jury panels of roughly six students per panel. If possible some of the juries should consist entirely of students who received the information on the case, some entirely of students who did not receive the information, and some partially of students from each group.

3. You or selected students should read the trial testimony out loud, instructing the students to listen carefully.

4. Read the Jury Instructions to the class.

5. Tell the students to meet in their jury panels and try to reach a unanimous verdict. Place student groups as far from one another as possible to prevent shared discussion.

6. After adequate time for deliberation, reconvene the class and poll each jury as to its verdict and the reasons that support it.

7. As part of the discussion ascertain how the information some of the students received affected the outcome. Ask such questions as:

   a. Why was the information prejudical — that is, had the jury used the information would it have unfairly hurt Greengrass' defense?

   The information may or may not be true. It implies that Greengrass was connected with the mob, a prejudicial fact not relevant to his guilt or innocence. It contains information obtained by a police wiretap which was not produced at trial; we do not know why this evidence was not introduced, but a reasonable guess is that the wiretap was illegal.

   b. Did you use the information or did you comply with the judge's instruction not to consider any information except that introduced at the trial? Why?

c. Was this simulation realistic or might the information have been used differently in a real trial?

d. What steps can be used to prevent jurors from getting such information from newspaper articles etc.?

Some possible solutions are
- *Ban the press from the trial.*
- *Order the press not to report about the trial or the parties.*
- *Move the trial to another location where there has been less publicity.*
- *Order the jury not to read or listen to any information on the trial except what they hear in court.*
- *Order the police officers, witnesses, and lawyers not to talk to reporters about the case.*
- *Once the trial begins, order the jury to live in a hotel and strictly limit its access to media (sequester the jury).*
- *Instruct the jurors to ignore any outside information they hear.*
- *If jurors hear prejudicial information, ask them whether they can ignore it and render an impartial verdict.*
- *If jurors hear prejudicial information, dismiss the jury and conduct a new trial.*

e. How effective would these steps be?

Sequestering the jury [having the jury not return home during the course of the trial], for instance, is considered effective in preventing bias from unfavorable publicity during the trial, but does not reduce the potential damage done by pretrial publicity. It also imposes hardships on the jurors.

f. Do we want wholly uninformed persons on a jury?

The class may be interested in Mark Twain's comments on a 19th century Nevada trial in Roughing It:

When the peremptory challenges were all exhausted, a jury of twelve men was empanelled — a jury who swore they had neither heard, read, talked about, nor expressed an opinion concerning a murder which the very cattle in the corrals, the Indians in the sagebrush, and the stones in the streets were cognizant of! It was a jury composed of two desperadoes, two low beerhouse politicians, three barkeepers, two ranchmen who could not read, and three dull, stupid human donkeys! It actually came out afterward that one of these latter thought that incest and arson were the same thing.

g. Why should the information be ignored, at least if it's true, when it clearly indicates that Greengrass is guilty?

The exclusionary rule says that if information was obtained illegally it cannot be used against the defendant. This is very controversial. See Lesson 8.

8. Point out that this activity demonstrates a potential conflict between the First Amendment's guarantee of freedom of the press and the Sixth Amendment which states that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an *impartial jury* . . . ."

9. What follows is the trial testimony and the jury instructions.

TRIAL TESTIMONY FOR THE PROSECUTION

Testimony of Inspector Kline, City Homicide Division:

I am Inspector Leslie Kline of the Omaha Police Department Homicide Division. I arrived at the scene of the alleged murder at 11:15 p.m. on the day of the 14th of October, 19__. The deceased, Dave Logan, was slumped in his desk chair, leaning over toward his left side. He was dead on my arrival, as a result of a head wound from a .38 revolver. The bullet had entered the right side of his head at close range below the ear, and exited from the left side of his head above the ear.

A .38 Colt revolver was found on the floor slightly in front of Logan's feet. It had been fired once, and had no other bullets in the chambers. The revolver had fingerprints on the handle from the right hand of the deceased. The deceased was a natural left-handed person. The revolver was registered to the defendant, Jim Greengrass. The revolver had a silencer and had no other fingerprints on it.

The doctor placed the time of death at approximately 9:00 to 9:30 p.m. There was no sign of a struggle, the only obvious disarray was a file drawer opened and some papers on the desk in front of the deceased.

TRIAL TESTIMONY FOR THE PROSECUTION

Testimony of Joe Johnson:

I am Joseph Johnson, a maintenance worker in the Hastings Building where Giant Home T.V., Inc. had its offices. In that capacity I got to know both Mr. Logan and the defendant, Mr. Greengrass. Logan and Greengrass hadn't gotten along for some time now. I would frequently hear them arguing. Once, about two weeks before Logan's death, I heard a voice I recognized as that of Mr. Greengrass shout at Mr. Logan, "If you continue to stand in my way, so help me I'll kill you. You know this is no idle threat." I heard them arguing again on October 14, the night of Logan's death. It was at about 8 p.m. Although I don't remember the details about what they were arguing about, it was clear that they were both quite angry. I got away from there as soon as I could and don't know when Greengrass left the building. I heard no shots. But when I returned to the office at 10:15 p.m., Logan was dead.

TRIAL TESTIMONY
FOR THE PROSECUTION

Testimony of C. Vann Woodward:

My name is C. Vann Woodward. I am an attorney in Omaha, Nebraska. I represented Dave Logan and drew up the incorporation papers for Giant Home TV, Inc. The corporation was formed to produce and market large screen TV sets for home viewing. Mr. Logan, the deceased, had invented a process whereby such large screen sets could be manufactured cheaply and with a better quality and brighter picture than currently available. Mr. Greengrass, the defendant, supplied much of the initial capital for the corporation. In addition Greengrass was purported to be an excellent salesman who could raise additional capital and do what was necessary to get the product into the marketplace. As Logan didn't trust Greengrass, whom he considered a bit sleazy, the articles of incorporation were written so that neither could take any significant action without the other's approval. For instance the patent rights, which were the corporation's main asset, could not be sold without the assent of both Logan and Greengrass.

It was also agreed, at Greengrass' insistence, that should either Greengrass or Logan die, the other would have survivorship rights to the corporation — that is the survivor would take over the entire corporation. I know that Greengrass also took out a life insurance policy on Logan's life that would pay the corporation $200,000 should Logan die.

There was trouble from the beginning. Logan didn't like some of the people Greengrass was dealing with and felt Greengrass was trying to get the TV's into production before the system had been perfected. They argued constantly. Logan finally got fed up with the whole thing and wanted to sell the system to General Electric which had made a nice offer for it. Greengrass, however, was convinced that the future money-making potential of the TV was enormous and wanted to borrow a great deal of money and go into production. Logan insisted that he could not afford to go further into debt and as time went on became more and more insistent on selling the patents, claiming he was desperate for money.

TRIAL TESTIMONY FOR THE DEFENSE

Testimony of Robert B. Russell:

I am Robert B. Russell, a friend of the deceased, Dave Logan. Logan was a very talented inventor who had developed a new system whereby giant screen color TV sets could be manufactured at a low cost. Logan, however, wasn't much at finances, that's why he brought in Greengrass. Logan was always in financial trouble. His first wife had divorced him and he was under court order to pay considerable support to his three children and alimony to his ex-wife. His current wife also liked to live high and spent money like it was going out of style. She was also threatening to divorce him.

In particular, she couldn't take his drinking and gambling which had grown worse in recent years. As a result of his gambling activities Logan was in debt to his bookie for more than $50,000.

His main hope for financial salvation was the patent rights to his large screen TV system, but, because he couldn't afford the time to wait for the sets to get into production, he wanted to sell off the patent rights. His partner, Greengrass didn't think this was a good idea because in the long run more money could be made by producing the sets themselves.

All this made Logan quite depressed. He sometimes talked of suicide. A few months ago he fell from the roof of his three story house; he claimed it was an accident. Logan was extremely energetic, working himself to the point of exhaustion. But when he got really depressed he became quite lethargic and didn't care about anything. He was in that state shortly before his death.

Jury Instructions

This is a criminal action prosecuted by the State of Nebraska against James Greengrass. The charge is that on or about the 14th day of October 19__ in Douglas County, Nebraska, the defendant did purposely kill David Logan. To this charge the defendant has entered a plea of not guilty.

The state has the burden of proving beyond a reasonable doubt that the defendant purposely killed David Logan. If you find beyond a reasonable doubt that the defendant purposely killed David Logan it is your duty to find the defendant guilty. If on the other hand you find that the state has failed to prove beyond a reasonable doubt that the defendant purposely killed David Logan, it is your duty to find the defendant not guilty. Reasonable doubt is such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have a very strong conviction of the guilt of the accused.

In arriving at your verdict you should consider only the evidence introduced before you in this trial. No other information should be considered.

You should deliberate with open minds, give respectful consideration to the opinion of fellow jurors, freely exchange views or opinions concerning the case, and not be hesitant to change your minds where reason and logic so dictate.

Activity 4-B:

The Case of Sam Nusworthy

AN ENRICHMENT ACTIVITY

Purpose: To further inform students about the potential prejudicial effects of publicity on a trial.

Student Materials: "The Case of Sam Nusworthy" text, pp. 25.

Directions:

1. Instruct the students to read "The Case of Sam Nusworthy"

2. Discuss the case by asking the following questions:

   a. What are the most important facts in this case?

   b. Why do you think the editorial writer gave so much coverage to this murder?

   c. What effect did these news stories have on those who read them?

   d. How might the legal issue of this case be stated?

   Whether, in view of the publicity before and during the trial, Sam was denied a fair trial.

   e. Did Sam receive a fair trial? Why or why not?

   f. Should Sam appeal this case? Why or why not? If the case is appealed, what arguments will be made on Sam's behalf?

   Because of publicity before and during the trial, Sam was unable to receive a fair trial.

   g. If the case is appealed, what will the government argue?

   Pretrial publicity alone does not constitute a denial of due process or a defendant's right to a fair trial. The American judicial system allows the news media to report what goes on in a public courtroom as a check on miscarriages of justice. Americans have a healthy distrust of secret non-public trials. We must trust the jury to disregard the publicity.

   h. If you were the appeals court judge, how would you decide this case? Why?

Note: This case is based on *Sheppard v. Maxwell*, 384 U.S. 333 (1966). The Court overturned the conviction, ruling that in cases involving a high probability of prejudice to one or the other of the parties stemming from pretrial and trial publicity, such prejudice could be presumed to exist and actual evidence of the exposure to and the effect on individual jurors of such publicity need not be presented.

Although the Court reiterated its extreme reluctance "to place any direct limitations on the freedom traditionally exercised by the news media," it did recognize that where there is a reasonable likelihood that prejudicial news prior to or during a trial will prevent a fair trial, the judge should take those steps necessary to guarantee a fair trial without imposing restrictions or sanctions directly against the press. Among those actions a judge may take to secure a fair trial are providing privacy for the jury; insulating witnesses from the media; and restricting the release of information from police officers, witnesses, and counsel for both sides.

Activity 4-C:

Gag Orders and Press Bars

Purpose: To provide students with information with which they can evaluate whether ordering the press not to print information or barring the press from a criminal proceeding is a viable solution to the problem of prejudicial publicity.

Student Materials: "Gag Orders and Press Bars" text and questions, pp. 26-27.

Directions: This activity provides some answers to the basic questions of Activity 4-A: What can be done to reduce the effects of prejudicial publicity in a criminal trial without infringing on First Amendment rights?

1. Instruct the students to read the ***Nebraska Press Association v. Stuart*** case study, pp. 26-27, and answer the questions that follow. The answers to questions 1-5 are all readily obtainable from the case study. Information on question 6 — whether it would have been better to close the preliminary hearing to the press — is contained in the "Press Bars" material immediately following the questions.

2. Direct the students to read the "Press Bars" material, p. 27, and discuss it with them. The major Supreme Court cases on closing criminal proceedings to the press and public are: *Gannett Co., Inc. v. De Pasquale*, 443 U.S. 368 (1979) (pretrial hearing on the suppression of evidence); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (criminal trial); *Globe Newspapers Co. v. Superior Court*, 457 U.S. 596 (1982) (testimony of minor sexual assault victim); *Press-Enterprise Co. v. Superior Court of California, Riverside County* [I], 464 U.S. 501 (1984) (voir dire examination of potential jurors); *Press-Enterprise Co. v. Superior Court of California, Riverside County* [II], 478 U.S. 1 (1986) (preliminary hearing).

3. Assign the students to write an essay on the question on page 27. Their essays might point out the importance of both the right of a free press and an accused's right to a fair trial, the need to keep the public informed on important events such as major crimes, and how news coverage of major crimes might make it difficult for the accused to get a hearing before an unbiased jury and could result in a reversal of a conviction. They might explain how the Supreme Court has said that ordering the press not to report on pre-trial court proceedings or closing the proceedings to the press and public are usually not adequate solutions to the problem because they inhibit freedom of the press. Solutions that courts favor include sequestering the jury, moving the trial, delaying the trial, carefully examining jurors to see if they are biased, and instructing the jury on its duty to decide cases solely on the evidence presented at trial.

Enrichment Exercise: One means of accommodating the constitutional rights of free press and free speech has been the promulgation of voluntary guidelines on the disclosure and reporting of information relating to criminal matters. They are usually jointly drafted by representatives of the bar and the press. Students may wish to investigate and report on Nebraska's bar-press guidelines. Copies should be obtainable from local newspapers or bar associations.

Activity 4-D:

Reporters Privilege

Purpose: To introduce students to the controversy over whether journalists should be able to protect the identity of their news sources from government investigation.

Student Materials: "Reporters' Privilege" case study (part 1),pg. 28, and Nebraska's Free Flow of Information Act (part 2), pg. 29.

Directions:

1. Distribute the case study to the students.

2. Direct the students to *role play* the fact situation with students portraying the confidential source (a ball player on the team who abhors drug use, but does not want it known that he talked to the reporter about it), the reporter, the U.S. attorney, and the judge. In the first scene the reporter interviews the ball player and at the ball player's insistence pledges confidentiality. In the second scene the U.S. attorney questions the reporter before a grand jury; the reporter refuses to reveal the identity of her source or turn over her notes. The judge then orders her jailed until she reveals the requested information.

3. Discuss the **You Be the Judge** questions on page 28. You may want to assign students to play the roles of the U.S. attorney and the lawyer for the reporter and have them argue before the judge whether the reporter should be required to reveal her source and turn over her notes.

4. Possible responses to the questions include:

    1. The conflict is whether a news reporter can be compelled to answer questions and provide documents (working notes) for a grand jury investigating the commission of a crime.

    2. The reporter is claiming that the First Amendment's protection of freedom of the press includes the right of reporters to protect the confidentiality of their sources.

    3. In addition to the constitutional claim described in answer 2, attorneys for the reporter could argue that if she is forced to reveal confidential news sources, some news sources will refuse to provide important information for fear of having their names revealed and suffering possible retaliation (e.g., loss of job, harassment).

    4. The U.S. attorney could argue that the name of the confidential source and the reporter's notes may be an integral element of a criminal investigation. By refusing to testify and produce the documentary evidence, the reporter is impeding justice and, by so doing, may be allowing criminals to get away.

        In addition, if the information is helpful to potential criminal defendants, then the reporter may be hampering a criminal defendant's Fifth Amendment "due process" protection, as well as a defendant's Sixth Amendment right "to have compulsory process for obtaining witnesses in his favor."

    5. This situation is based on a series of similar cases decided by the U.S. Supreme Court: *Branzburg v. Hayes, In Re Pappas, U.S. v. Caldwell*, 408 U.S. 665 (1972). In these cases, by a 5-4 margin, the Supreme Court held that requiring news reporters to appear and testify before state or federal grand juries does not abridge their freedom of speech and press guaranteed by the First Amendment.

135

The *Caldwell* case involved a reporter who refused to testify before a federal grand jury relative to information he had gathered from other persons. Branzburg, a reporter for the *Louisville Courier-Journal,* had refused to answer grand jury questions about drug law violations he had personally observed. Pappas, a television reporter, had visited the headquarters of a militant organization, but refused to tell a grand jury what he had seen there.

5. Hand out part two of the activity - **Nebraska's Free Flow of Information Act** and discuss the questions.

   1. This is a reporter's shield law which says that in any federal or state court proceeding (defined in 01 Sec. 20- 145 Nebraska Statutes as any proceeding or investigation before or by any federal or state judicial, legislative, executive, or administrative body) no news reporter can be forced to reveal the sources of his or her information or any information received in the process of news gathering that is not published or broadcast.

   2. While the Supreme Court said that the First Amendment did not in itself provide protection for reporters who did not want to reveal their sources, that does not prevent the federal government or state governments from passing a law that creates this protection. The federal government can pass laws that do not conflict with the Constitution. State governments can pass laws that do not conflict with the federal and state constitutions or with federal law.

   3. Nebraska's law appears to be absolute. It says, "No person . . . shall be required to disclose. . . ." Yet there is a strong argument that it would be unconstitutional for the State of Nebraska to apply its law in this situation. By using this law to prevent Clyde from getting information that could exculpate him, it can be argued that the state is violating Clyde's Sixth Amendment right "to have compulsory process for obtaining witnesses in his favor" and Fifth Amendment right to "due process." A law cannot be applied in a way that violates the U.S. Constitution.

Enrichment Exercise: Assign students to interview a news reporter and a judge regarding a journalist's rights and responsibilities in using confidential sources.

We the People

Activity 4-E:

Television Coverage in the Courtroom

AN ENRICHMENT ACTIVITY

Purpose: To introduce students to arguments for and against allowing courtroom procedures to be televised.

Student Materials: "Television Coverage In the Courtroom" for and against arguments, pp. 30.

Directions:

1. Ask the students whether they believe that television cameras should be permitted in courtrooms to provide coverage of trials.

2. After students have indicated their initial responses have them brainstorm reasons to support their yes or no answers. List their reasons on the chalkboard under **For** and **Against** columns.

3. Distribute the student materials and instruct them to complete the exercise as indicated in the directions.

   The appropriate responses to the statements are:

   1. Against
   2. Against
   3. For
   4. For
   5. Against
   6. For
   7. Against
   8. For
   9. For
   10. Against

4. Ask the students whether they have changed their views on whether cameras should be allowed in courtrooms in light of doing the activity. If yes, why?

5. Point out that in Nebraska cameras are allowed in the Supreme Court, but not in other courtrooms.

We the People

STUDENT MATERIALS

Activity 4-A

Juries in Nebraska

Who may serve on a state jury?

1. U.S. citizens residing in any county in Nebraska,
2. who are registered voters or licensed motor vehicle operators,
3. who are over 19 years of age,
4. and who are able to read, speak, and understand the English language.

Who may not serve on a state jury?

1. Judges and clerks of court may not serve.
2. Sheriffs or jailers may not serve.
3. Persons, or the spouse of persons, who are parties to the case at trial may not serve.
4. Persons who have been convicted of a felony may not serve.
5. Persons who are physically or mentally incapable of serving may not serve.
6. Husband and wife may not serve on the same jury.
7. Persons 65 years of age or older may be excused if they wish.
8. Judges can dismiss jurors for undue hardship, extreme inconvenience, or public necessity.

Goals behind Nebraska's jury selection procedures:

1. To insure that persons are selected at random and are a fair sampling of the area's population.
2. To insure that all qualified citizens have an opportunity to serve.
3. To insure that all qualified persons fulfill their obligation when called to serve.
4. To insure that no citizen is excluded from jury service because of race, color, religion, sex, national origin, or economic status.

Selection procedures:

1. Each county in Nebraska has a jury commissioner.
2. By a selection procedure that is pure chance, the commissioner selects a "key" number from the numbers 1 through 10.

3. The jury commissioner receives a complete list of all registered voters and of all licensed motor vehicle operators who are age 19 or older. The commissioner removes duplications from this master list. Then the name of the person whose numerical order on the master list corresponds with the key number and every tenth name thereafter go on the jury list.

4. Questionnaires may be sent to each person on the jury list to determine whether he or she is qualified, or the judge will question them as they appear in court in response to a summons.

5. Twenty-four jury members are selected for each judge who will be needing a jury; the rest are dismissed, but may be called back.

6. Before the trial, attorneys question prospective jurors. This is called the voir dire. If any prospective juror indicates some disqualifying reason why he or she cannot reach an objective verdict — for instance the juror is prejudiced or knows something about the case — he or she may be challenged for cause by one of the attorneys and removed from the jury panel. Then each attorney "strikes" jurors he or she would prefer not to have one-by-one, until the jury is down to either six or twelve members.

What if I fail to appear and fulfill my jury duty?

If you meet the qualifications of a jury member, it is your duty as a citizen of the United States to serve when called upon. If you fail to do this and do not have an acceptable excuse, the judge will find you "in contempt of court" and may fine you or put you in jail.

Might I lose my job if I have to serve on a jury and cannot work?

No. Employers are prohibited by law from firing you, refusing to pay you, taking away your vacation time, or otherwise punishing you for serving on a jury if you have given them adequate notice beforehand.

Definitions:

Petit Jury - (pronounced "petty" jury) an ordinary jury of 6 or 12 members for the trial of a civil or criminal case.

Grand Jury - a jury of 12-23 persons in a criminal case who are sometimes required to decide whethe someone ought to charged with a crime.

We the People

Should the jury system be abolished?

Use of the jury system attracts a certain amount of criticism from those who feel it is inefficient, expensive, and subject to improper influences. A great deal of time and money is involved in narrowing the number of eligible citizens down to the number who will serve. In criminal trials jury verdicts must be unanimous. In civil cases unanimous or 5/6ths verdicts are needed. Mistrials occur because a minority of jury members can create a hung jury (a jury that cannot agree). In some cases jurors cannot understand the complex legal questions nor the courtroom requirements for evidence. Jurors may be swayed by the tactics of attorneys making emotional appeals and manipulating witnesses. Changes have been made in European countries to minimize the effects of these problems. Perhaps it's time for the United States to follow suit.

Some information on the case you are about to hear:

James Greengrass went on trial today for the murder of David Logan, his business partner in Giant Screen TV, Inc. Greengrass, who is reported to have claimed he shot Logan while the latter was working at his desk one evening last October, came to Omaha ten years ago from New York City, where he had been convicted of the sale of fraudulent stock. Greengrass and Logan reportedly had long been feuding about the future direction of Giant Screen TV, Inc. With Logan's death, Greengrass was able to take control of the corporation and also stood to recover $200,000 in insurance proceeds. The scheme might have worked, but for the fact that the Omaha Police had long maintained a tap on Greengrass' phone, and had heard him tell Sam Schwartz, Greengrass' former New York business associate, that he (Greengrass) had killed Logan and would soon have the money he needed to start production of the large screen TV sets that were the creation of Giant Screen TV, Inc. Sam Schwartz was killed during a mob shootout in New York City last month.

Activity 4-B

The Case of Sam Nusworthy

Sam Nusworthy's pregnant wife, Marilyn, was brutally bludgeoned to death in an upstairs bedroom of her home. During the ensuing investigation, Sam stated that at the time of the murder he was asleep on a couch in the living room. He heard his wife cry out and he rushed upstairs where, in the dim light from the hall, he saw a "form" standing near his wife's bed. As he struggled with the "form" he was struck on the back of the neck and fell to the floor unconscious. When he regained consciousness he found his wife dead.

From the beginning of their investigation, the police believed Sam was guilty of murder and interrogated him at great length and without benefit of legal counsel. Sam was also pressed by the police to take an "infallible" lie detector test or an injection of "truth serum" or to confess. Sam refused to take any such test, and steadfastly asserted his innocence.

The New York Times
DON'T WORRY; EVERYTHING IS GOING TO BE ALL RIGHT
LOCALS STUNNED
TORONTO, ATHENS, LONDON, PARIS, ROME MOSCOW, WASHINGTON
TRENDS
GENEVA SHOCKED
NO PROBLEM!
CHICAGO
HOUSTON
SAN FRANCISCO
SEATTLE

The local newspaper, which took a great interest in the case, played up Sam's refusal to subject himself to a lie detector. Thereafter, an editorial writer questioned the innocence of Sam by charging on a front page editorial that somebody was **"GETTING AWAY WITH MURDER!"** The following day, another front page editorial was headed: **"WHY NO INQUEST? DO IT NOW DR. GERBER!"** The coroner called an inquest that same day. It was staged in a school gymnasium and televised live to the local community.

Other editorials followed. One was entitled: **"WHY DON'T POLICE QUIZ TOP SUSPECT?"** Another asked: **"WHY ISN'T SAM IN JAIL?"** Immediately after these editorials, Sam was arrested and charged with murder. After his arrest, the publicity intensified. Cartoons, editorials, and news stories and features, insistent on Sam's guilt, poured forth from the local presses and radio and television stations.

During the nine-week trial, there were so many news reporters that some were seated inside the bar (the work area of a trial) and at a press table only a few feet from the jury box. Radio broadcasting was done in the courthouse from a room adjacent to the one the jury deliberated in, and the jury's discussions were overheard and reported. The noise of newsmen moving in and out of the courtroom made it difficult for counsel and witnesses to be heard many times during the trial. Further, the names and addresses of the jurors were published and they received letters and telephone calls during the trial. Prospective witnesses were interviewed by the news media, sometimes disclosing their testimony, and in some instances it was reported before they had testified in court.

At the end of the trial, Sam was found guilty of second degree murder.

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Activity 4-C

Gag Orders and Press Bars

A. Gag Orders

***Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976)**

Six members of a family were found murdered in their home in Sutherland, Nebraska. Some had been sexually assaulted. Erwin Charles Simants was arrested the next morning. He was brought before a judge for a preliminary hearing, a hearing in which the judge was to determine whether there was enough evidence to charge Simants with murder and sexual assault. Before the hearing Simants' defense attorney and the prosecutor (the lawyer who represents the government in bringing legal charges against an alleged wrongdoer) both requested that the judge issue an order prohibiting the press from reporting information heard or observed at the preliminary hearing. They felt that this "gag order" was necessary to preserve the accused's right to an impartial jury. They believed that detailed news reports might create a bias among potential jurors in this small community.

The Nebraska Press Association entered the case claiming that the gag order violated the rights of a free press. The judge ordered that until a jury was selected the press could not report on 1) the existence of or contents of any confessions, 2) the fact of or nature of any of Simants' statements, 3) the contents of a note that Simants had written that night, 4) some of the medical testimony, 5) the identity of the alleged sexual assault victims or the nature of the assault.

The press association appealed the order to the Nebraska Supreme Court. The Court upheld the restrictions with some modifications. The Court believed that the order was necessary to protect Simants' right to a fair trial, especially since Nebraska law required the trial to be held within six months and prevented moving the trial to any other county, except a county next to Lincoln County, where Sutherland is located.
The press association appealed the case to the U.S. Supreme Court. In an unanimous opinion the Court held that the gag order in this case violated the First Amendment protection of freedom of the press. The order was a prior restraint on the press and "barriers to prior restraint remain high."

The Court said that alternative measures may have adequately protected Simants' rights: changing the place of trial, delaying the trial to allow public attention to subside, probing questioning of prospective jurors, or instructing the jury emphatically and clearly on the sworn duty of each juror to decide the issues only on evidence presented in open court. In addition, the Court held that pre-trial publicity does not automatically lead to an unfair trial and that it was unclear that the gag order would have protected Simants. After all, the events took place in a small town and rumors about the case would circulate swiftly. In a concurring opinion Justice Brennan wrote:

> [T]he press may be arrogant, tyrannical, abusive, and sensationalist, just as it may be incisive, probing, and informative. But at least in the context of prior restraints on publication, the decision of what, when, and how to publish is for editors, not judges.... Every restrictive order imposed on the press in this case was accordingly an unconstitutional prior restraint on the freedom of the press . . . .

Questions

1. What was the conflict in this case?
2. How does this case involve the First Amendment?
3. What arguments did the defendant and prosecuting attorney make in support of the gag order?
4. What argument did the press association make against the gag order?
5. How did the United States Supreme Court decide the issue? Why?
6. Would a better solution to this conflict be closing the preliminary hearing so that the press would not have the information to report?

B. Press Bars

The Supreme Court has on many occasions considered the issue of whether a criminal court proceeding can be closed to the press and the public. The *Sixth Amendment* guarantees the right to an open trial to a defendant, but the Court has held that that right belongs to the defendant alone, not to the press or the public. So if the defendant requested that the proceeding be closed, the court could do so without violating the Sixth Amendment. The court need not honor the defendant's request, however.

On the other hand, the Court has said that the *First Amendment* provides the press and the public with a constitutional right of access to criminal trials, to ensure that the "discussion of governmental affairs is an informed one." Open criminal proceedings assure the public that justice is being done and that the standards of fairness are being observed.

To determine whether any criminal proceeding can be closed to the press and the public a court has to consider whether that particular kind of proceeding has been historically open to the press and general public and whether public access plays a significant positive role in the functioning of the particular proceeding. If the answers to these two questions are yes, the First Amendment guarantees public access to the proceeding *unless* it can be clearly demonstrated that closing the trial is essential to preserve a high value such as the accused's right to a fair trial.

The Court has decided that criminal trials, preliminary hearings, and questioning of potential jurors before trial are all proceedings that should be open, absent extraordinary circumstances. It has also stated that grand jury proceedings that have traditionally not been open to the public do not need to be open. In some cases hearings to decide whether certain evidence (such as confessions) was obtained legally and whether it can be admitted into evidence can be closed. Portions of a trial where a minor who was a victim of a sex crime is testifying can also be closed, if it can be shown that closure is necessary to protect the minor's physical and psychological well-being.

Question

Describe the conflict between the First Amendment's guarantee of freedom of the press and the rights of a criminal defendant to a fair trial in front of an unbiased jury. What means are available to reduce this conflict?

Activity 4-D

Reporter's Privilege

(Part 1)

A reporter is investigating alleged illegal drug use and abuse in professional baseball. The reporter has quoted a well-informed, confidential source that "at least three of the regular starters on the Omaha Royals had purchased cocaine in the team's locker room."

Attorneys from the U.S. Attorney's office (lawyers who represent the federal government)ssue a grand jury subpoena for the reporter and her notes. (A subpoena is an order requiring someone to appear and give evidence and/or to bring something which will be used as evidence. A grand jury which will decide whether someone will be charged with a crime.) The U.S. Attorney wishes to identify the confidential source in order to collect additional evidence that might lead to criminal charges. The reporter refuses to provide the name of the informant or to turn over her working notes. She claims that if she revelas the identity of her source, other people who could provide information would refuse to talk with her for fear that their identities would be revealed. The reporter also claims that a free press must include the right to gather information, and in order to secure some information, reporters must have the right to protect the confidentiality of their sources.

You Be the Judge

1. What is the conflict in this situation?

2. How does this situation involves the First Amendment?

3. If you were representing the reporter, what arguments would you make in support of her refusal to testify and turn over her working notes to the U.S. attorney?

4. If you were the U.S. attorney assigned to this case, what arguments would you make for compelling the reporter to testify and provide the name of her confidential source?

5. If you were a judge deciding whether to issue and order compelling the reporter to testify and turn over working notes, how would you decide and why?

Activity 4-D

Reporter's Privilege

(Part 2)

Nebraska's Free Flow of Information Act

20-144. Finding by Legislature. The Legislature finds:

(1) That the policy of the State of Nebraska is to insure the free flow of news and other information to the public, and that those who gather, write, or edit information for the public or disseminate information to the public may perform these vital functions only in free and unfettered atmosphere;

(2) That such persons shall not be inhibited, directly or indirectly, by governmental restraint or sanction imposed by governmental process, but rather that they shall be encouraged to gather, write, edit or disseminate news or other information vigorously so that the public may be fully informed;

(3) That compelling such persons to disclose a source of information or disclose unpublished information is contrary to the public interest and inhibits the free flow of information to the public;

(4) That there is an urgent need to provide effective measures to halt and prevent this inhibition;

(5) That the obstruction of the free flow of information through any medium of communication to the public affects interstate commerce; and

(6) That sections 20-144 to 20-147 are necessary to insure the free flow of information and to implement the first and fourteenth amendments and Article I, section 8, of the United States Constitution, and the Nebraska Constitution.

* * *

20-146. Procuring, gathering, writing, editing, or disseminating news or other information; not required to disclose to courts or public. No person engaged in procuring, gathering, writing, editing, or disseminating news or other information to the public shall be required to disclose in any federal or state proceeding:

(1) The source of any published or unpublished, broadcast or nonbroadcast information obtained in the gathering, receiving, or processing of information for any medium of communication to the public, or

(2) Any unpublished or nonbroadcast information obtained or prepared in gathering, receiving, or processing of information for any medium of communication to the public.

QUESTIONS

1. In your own words, what does 01 Sec. 20-146 of the Nebraska Statutes say?

2. This act was passed by the Nebraska legislature after the decisions of the U.S. Supreme Court that were discussed in Part 1 of this activity. How can the state legislature create a reporters' "shield law' like this one, after the U.S. Supreme Court said the First Amendment does not protect a reporter from having to divulge confidential sources before a grand jury?

3. Clyde was accused of murdering Samantha. A reporter wrote a story in the *Scottsbluff Star-Herald* that quoted an anonymous person as saying, "The police should let Clyde go. He did not kill Samantha. I know who did and it was not Clyde." Clyde's attorney subpoenas the reporter and his notes. He refuses to testify at Clyde's trial and produce his notes, claiming he is protected by Nebraska's Free Flow of Information Act. Can the judge order the reporter to testify?

147

Activity 4-E

Television Coverage In The Courtroom

Read each of the statements below. Each statement represents an argument for or against permitting television cameras in courtrooms. After reading each statement, write **"For"** in the space before the statement if you believe the statement is an argument for allowing television coverage of courtroom proceeding, or write **"Against"** if you believe the statement is an argument against allowing TV coverage.

_____ 1. Displaying the accused on television will act to permanently stain the reputation of the accused and may cause shame to the individuals' family.

_____ 2. If the television news reporters pick and choose what to show from a trial, then the public may get a distorted view of the judicial proceeding.

_____ 3. The public has a right to know what is going on in a public trial, and television is one of the most effective means of informing the public.

_____ 4. Almost half of the states have policies that permit television cameras in the courtroom, and the experience in these states has proven that television coverage is not disruptive of the judicial process.

_____ 5. If television cameras are in the courtroom, witnesses, judges, and attorneys may concentrate more on making a good impression on television than on discovering the truth, thus subverting a defendant's Fifth and Sixth Amendment rights to due process and a fair trial.

_____ 6. Television coverage will help the public better understand how the judicial system really works.

_____ 7. Sometimes the media acts like a mob and all the cameras and audio equipment might get in the way and cause distractions in the courtroom.

_____ 8. Televising criminal trials may serve as a deterrent to potential criminals because they will have an opportunity to see from the convictions and sentencing that crime does not pay.

_____ 9. Television reporters can work out an arrangement with the courts to insure that the cameras and equipment are not distractions. Newspaper reporters cover trials all the time, and television news reporters should have the same opportunity. After all, the right to report the news is protected by the First Amendment's freedom of the press guarantee.

_____ 10. Potential jurors, and those selected as jurors for a trial, may be unduly influenced by the possibility of being on television; the jurors may be more concerned with "looking good on TV" than on listening to the case.

The Bill of Rights

A Law-Related Curriculum for High School Students

Lesson 5: Freedom of Religion

LESSON 5

FREEDOM OF RELIGION

INTRODUCTION

> *I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion or prohibiting the free exercise thereof," thus building a wall of separation between church and state.*
>
> -Thomas Jefferson.

The first sixteen words of the Bill of Rights, most of which are contained within the quotation by Jefferson, deal with the concept of freedom of religion. That these words were placed at the beginning of the Bill of Rights emphasizes the strong feelings our founding fathers held regarding religious tolerance and the relationship between church and state. The strong beliefs of the drafters of the Bill of Rights did not, however, immediately alter the way the states of the new nation practiced religious tolerance or the separation of church and state.

The United States was well into the 19th Century before changes in attitudes caused many states to abandon state religions and restrictions on citizens of certain religious affiliations. The struggle to define the boundaries of the First Amendment's "establishment clause" -- forbidding the government from passing any law respecting religion -- and the "free exercise clause" -- protecting individuals' rights to worship or believe as they choose -- has continued throughout the history of the United States.

The United States Supreme Court, and many lower courts, have continuously been confronted with difficult decisions regarding what constitutes government passing laws respecting the establishment of religion (prayer in public school? a city including a Nativity scene in its Christmas display? the Nebraska legislature paying a minister to open each session with a prayer?) and what practices constitute government infringement upon an individual's freedom to worship or not worship as he/she sees fit (the right of an individuals to handle poisonous snakes or to smoke peyote as a part of their religious ceremonies? the right of an individual to refuse a blood transfusion because of religious beliefs? the right of members of a group to refuse to send their children to school after a certain age, in violation of state law?).

GOAL

To understand the importance of the First Amendment's prohibition against laws respecting the establishment of religion and the First Amendment's protection of freedom of religious exercise.

OBJECTIVES

As a result of this lesson, students will be able to:

1. Comprehend the significance of historical factors in shaping our nation's understanding of freedom of religion *(Activity 5-A)*.

2. Comprehend what is meant by the "establishment" clause and the "free exercise" clause of the First Amendment *(Activity 5-B)*.

3. Analyze United States Supreme Court's interpretations of "establishment" clause cases *(Activity 5-C)*.

4. Analyze United States Supreme Court interpretations of "free exercise" clause cases *(Activity 5-D)*.

TABLE OF CONTENTS

Introduction.. 1
Goal, Objectives, & Table of Contents..................... 3
Media Resources... 5

Teaching Instructions
    Activity 5-A: In Pursuit of Religious Freedom.......11
    Activity 5-B: The Establishment and Free Exercise Clauses.................15
    Activity 5-C What Constitutes and Establishment of Religion?..........................17
    Activity 5-D: No Photographs Please -- A Free Exercise of Religion Activity....................23

Student Materials
    Activity 5-A: In Pursuit of Religious Freedom.......31
    Activity 5-B: The Sunset Proclamations..............37
    Activity 5-C: What Constitutes an Establishment of Religion? 39
    Activity 5-D: No Photographs Please -- A Hypothetical Case...............................49

MEDIA RESOURCES

FREEDOM OF RELIGION
This program questions the limitations of religious freedom. It focuses on the story of a pregnant Jehovah's Witness who, after suffering an injury in an automobile accident, refuses a blood transfusion which would save her life and the life of her unborn child. The issue is brought to a judge for a decision, but the resolution is left to the student. From *Bill of Rights in Action* series, BFA Educational Media, 1969, film or videotape, 23 minutes, color.

IN OUR TIME: RELIGION IN AMERICA
An historical survey of religion in the U.S. from colonial times to the present, featuring three experts discussing different aspects of religious tradition. Random House Media, 1988, videotape, 15 minutes, color.

LIBERTY UNDER LAW -- THE *SCHEMPP* CASE: BIBLE READING IN PUBLIC SCHOOLS
This 16mm film focuses on the famous *Schempp* case which challenged the constitutionality of a Pennsylvania law requiring Bible reading in school. The issues are followed through a re-enactment of the circumstances which gave rise to the case in Abington High School, the pressures put on the Schempp family, and the trials in the lower courts. The film also includes commentary on other freedom of religion cases. Encyclopedia Britannica Corporation, 1969, 35 minutes, color.

RELIGIOUS FREEDOM IN AMERICAN BEGINNINGS
This 16mm film provides historical background about European religious persecution and early colonial religious issues in the Plymouth Colony, Rhode Island, Pennsylvania, and Maryland. The film shows the status of religious freedom in the various colonies, refers to the slaves' plight with respect to religious freedom, and discusses the effects of westward expansion on religious liberty. Coronet Instructional Media, 1971, color.

THE WITCHES OF SALEM -- THE HORROR AND THE HOPE
This 16mm film uses actual court records to dramatize the background and trial of the Salem "witches." It raises important issues connected with due process, freedom of religion, power conflicts, checks and balances, and individual rights. Learning Corporation of America, 1972, black and white.

THE SALEM WITCH TRIALS
A re-enactment of the 1692 Salem witchcraft trials. The program invites students to inquire into the motives behind the trials and to consider the influence that moral fervor and religious belief have had on the delivery of justice. From *Great American Trials* series, Educational Enrichment Materials, sound filmstrip, color.

THE SUPREME COURT'S HOLY BATTLES

The battles over religion in the nation's courts are explored in this documentary, hosted by Capitol Hill correspondent Roger Mudd. To help determine what the religion clauses of the First Amendment mean, the program returns to the time when the First Amendment was written. America was the first country to legally separate church and state, and while Madison and Jefferson were the architects of this radical idea, others -- such as Patrick Henry and George Washington -- opposed the idea, believing that a state religion would benefit the country. The program then looks at the controversial 1960's Supreme Court decisions banning prayer in the public schools and the more recent legal battles over the teaching of religion in the classroom, the meeting of student prayer groups in school buildings, public funding for church schools, "In God We Trust" on the nation's currency, and whether chaplains of the U.S. Congress should be paid for by the taxpayers. Film Odyssey and WHYY/Philadelphia, 1989, one hour, color.

PRAYER IN THE CLASSROOM

This provocative program describes the controversial efforts to bring prayer into the public schools. In the process, the conflict between the free exercise clause and the establishment clause is discussed. From *This Constitution: A History* series, International University Consortium, 1987, 30 minutes, videotape, color.

RELIGION AND PUBLIC SCHOOLS

This filmstrip presents the controversy over school prayer, evolution, and creationism to motivate students to consider what place, if any, religion has in our public schools. From *Street Law: A Student's Guide to Practical Law* series, Educational Enrichment Materials, 1982, sound filmstrip, color.

"THE GARDEN AND THE WILDERNESS"

In 17th Century colonial America, religious leader Roger Williams feared that the "wilderness of state" threatened the "garden of God" and called for a "wall of separation" between them. This documentary examines how differing factions have disagreed sharply over the role of religion in school, government, and other areas of public life. In presenting the arguments on both sides, the program encourages viewers to reflect on those issues that even today are far from settled, and begin to formulate their own opinions on where and how broad the line should be drawn between the Garden and the Wilderness. From *The Constitution Project* series, The Constitution Project and WHYY Television, 1988, videotape, one hour, color.

MARY S. McDOWELL: PROFILE IN COURAGE

A Quaker teacher at a New York high school during World War I refuses to sign a loyalty pledge or take part in war support activities because of her religious beliefs. Her stand results in her dismissal for "disloyalty and insubordination" and "conduct unbecoming a teacher." Stars Rosemary Harris. From *Profiles in Courage* series, Zenger, videotape, 50 minutes, black & white.

FREE TO BELIEVE

Host Peter Jennings explores what happens when the constitutionally guaranteed rights of freedom of religion, speech, press, and assembly are pushed to their limits or otherwise tested. The program focuses on Mobile, Alabama, where fundamentalists are concerned with what they see as efforts "to divorce religion from everything but the church building." Challenging this restriction, they claim that a number of state-approved textbooks violate the separation of church and state by promoting the Godless religion of "secular humanism." From *We the People* series, American Bar Association, 1987, videotape, 56 minutes, color.

THE FIRST FREEDOM

A documentary that examines religious freedom through the Virginia statute that served as the basis for the First Amendment. Film America, color.

INHERIT THE WIND

Frederic March and Spencer Tracy compete in the courtroom over the issue of teaching evolution in the schools in this lightly fictionalized recreation of the Scopes "monkey trial" of 1925. Directed by Stanley Kramer. United Artists, 1960, 127 minutes, black and white.

THE SCOPES TRIAL

A re-enactment of the famous Scopes "monkey trial" of 1925, which pitted Clarence Darrow against William Jennings Bryan. The program invites students to inquire into the motives behind the trial and to consider the influence that moral fervor, religious belief, political maneuvering, and popular sentiment have had on the delivery of justice. From *Great American Trials* series, Educational Enrichment Materials, sound filmstrip, color.

SCHOOL PRAYER, GUN CONTROL, AND THE RIGHT TO ASSEMBLE

A series of events embroils a small town in First and Second Amendment controversies. Featured are former Attorney General Griffin Bell, former Secretary of Education Shirley Hufstedler, and civil liberties counsel Jeanne Baker. From *The Constitution: That Delicate Balance* series, Columbia University Seminars on Media and Society and the Public Broadcasting Service, 1984, videotape, one hour, color.

TEACHING INSTRUCTIONS

Activity 5-A: In Pursuit of Religious Freedom

Purpose: To heighten students' awareness of the historical background of religious freedom in the United States.

Student Materials: In Pursuit of Religious Freedom, pp. 31-34.
Questions for Discussion, p. 35.

Directions:

1. Instruct the students to read "A History of America's Religious Freedom."

2. Divide the students into two teams. Have each team designate one person as scorekeeper. Both scorekeepers should go to the blackboard and write their team names.

3. Decide which team answers first. Designate one person from that team to answer first. Designate one person from the other team to ask the first question.

4. If the person designated to answer the first question is correct, the team scores 10 points. If the person is incorrect or unable to answer, anyone on the team may answer for 6 points. If no one on the team answers correctly, the other team may attempt to answer for 3 points.

5. Designate a person from the team which answered first to ask the second question of someone on the other team. Continue as in number 4 until all of the questions have been asked. The team with the most points at the end is the winner.

Suggested answers:

1. Virginia, Maryland, North Carolina, South Carolina, Georgia, and, in part, New York.

2. Massachusetts (Connecticut -- 1818; New Hampshire -- 1816).

3. Roger Williams.

4. William Penn.

5. Vast distance from mother country made administration of American churches difficult and the vastness of America made parishes large and unwieldy administratively. Both of these factors, therefore, contributed to little or no church control over most Americans' daily lives.

6. Persons not themselves connected with any church were not likely to persecute anyone else for their similar independence. Nor were these persons likely to put up with compulsory taxation to support a church to which they did not belong.

7. There were so many sects which were not a part of any state religion that everyone had to learn to live together in order for the colony to survive. No one sect was strong enough to destroy the others and establish itself as the national religion. The diversity also made uniformity impossible and without uniformity the state-established church could not last.

8. Each of the colonies desperately needed more emigrants to make the venture economically profitable for the sponsoring organization. For business purposes the colonists were forced to deal with people of differing religions on a daily basis. This tended to soften any bad feelings toward other sects.

9. Political privileges were mostly restricted to Christian Protestants. Jews, Catholics, and other minority groups were excluded. There were other restrictions on religious minorities.

10. Baptists, Quakers, and Presbyterians.

11. No compulsory religious service attendance; no restrictions on life because of religious beliefs; no compulsory taxation for support of church; and freedom for everyone to believe as they wish.

12. Wars generally have a unifying effect by submerging internal differences. Since the American Revolutionary War was based on the ideological grounds stated in the Declaration of Independence, it would have been difficult for thoughtful persons to overlook the inconsistency between the practice of religious discrimination and the natural rights doctrines of freedom and equality. Also, concessions had to be made to dissenting sects to insure their cooperation in fighting the war and to win the support of other countries.

13. The Great Awakening was an evangelical religious revival originating in New England in the middle of the 18th century emphasizing an emotional and personal religion. It stressed the rights and duties of the individual conscience and its answerability exclusively to God. It represented a break with formal church religion and was, therefore, constantly at odds with the state established religions. The groups which formed the movement became some of the staunchest supporters of separation of church and state because of their continual resistance to the coercive force of the state religions.

14. 1791.

15. In New York, Catholic priests were banished for teaching or practicing their faith; in Virginia, a denial of the Trinity was punishable by three years imprisonment and Unitarians or Freethinkers could have their children taken from them because of their beliefs; in Massachusetts, dissenters were thrown in jail for failure to support the state church.

16. As related in Lesson One, the Bill of Rights was added to the Constitution as a check on the power of the new national government. The First Amendment said, "*Congress* shall make no laws...." It made no mention of state governments. After the Civil War, the 14th Amendment was enacted. It is the due process clause of the 14th Amendment that today prevents state governments from interfering with the fundamental freedoms guaranteed individuals in the Bill of Rights.

Activity 5-B: The Sunset Proclamations

Purpose: To provide students with an understanding of what is meant by the "establishment" and "free exercise" clauses of the First Amendment.

Student Materials: "The Sunset Proclamations" p. 37.

Directions:

1. Instruct the students to review the first sentence of the First Amendment in their Extended Bill of Rights. The sentence can also be found at the end of Activity 5-A.
2. Ask the students to describe in their own words the two provisions in that sentence that deal with religious freedom.
3. Direct the class to read and think about the hypothetical situations and questions. Lead a class discussion on the hypothetical situations.

Comments on the Hypotheticals:

A. This is a violation of the *establishment clause* -- the clause of the First Amendment that reads, "Congress shall make no law respecting the establishment of religion." Congress is establishing sunset worship as the prescribed state religion.

B. This is a violation of the *free exercise clause* -- the clause of the First Amendment that reads, "Congress shall make no law...prohibiting the free exercise [of religion]." The Congressional action has the effect of punishing persons for their religious beliefs and practices. It prohibits the freedom of sun worshippers to practice their religion without governmental interference.

C. This is a violation of the *establishment clause*. Congress is again establishing sunset worship as the prescribed state religion, but instead of doing it directly as in situation A, it is doing it indirectly by imposing a heavy burden on those who do not fall in line. For more on the establishment clause, see Activity 5-C.

Note: To the extent that sun worshipping is the violation of the religious beliefs of some people, this (as well as situation A) is also a violation of the free exercise clause.

D. This hypothetical involves the *free exercise clause*. The judge's order interferes with the right of Carla's parents to practice their religion without governmental interference. They are being forced to subject their daughter to an operation that violates their religious principles. However, the right to religious freedom is not absolute. Sometimes the right to practice one's religion as one chooses can be curtailed if by doing so the government is protecting a very important governmental interest -- here the government's interest in protecting the life of a child.

This hypothetical is based on the case of *People ex rel. Wallace v. Labrenz*, 344 U.S. 824 (1952). In that case the judge took the child out of the custody of the parents and appointed a legal guardian to have temporary custody of the child. The guardian immediately gave permission for the blood transfusion. The U.S. Supreme Court held that the trial judge's action did not violate the free exercise clause:

> The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.... Parents may be free to become martyrs themselves. But it does not follow that they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make the choice for themselves.

For more on the free exercise clause, see Activity 5-D.

Activity 5-C: What Constitutes an Establishment of Religion?

Purpose: To identify, examine, and evaluate issues and arguments related to the establishment of religion clause of the First Amendment.

Student Materials: What Constitutes an Establishment of Religion?, p. 39.
Case Studies, pp. 40-47.

Directions:

1. Divide the class into groups of five or six students.

2. Instruct each group to read each fact situation and argument, discuss each argument thoroughly, and then take a position for or against the constitutionality of the government action. Encourage the group to reach a consensus rather than take a vote. A recorder from each group should report to the class on the group's position and the reasons for taking that position.

3. Compare the positions taken by the various groups and the decision reached by the court in the case on which the fact situation was based.

Court Opinion Summaries:

1. *Engle v. Vitale*, 370 U.S. 421 (1962): In a 6 to 1 ruling (with two justices not taking part in the decision), the U.S. Supreme Court ruled that the compulsory prayer was unconstitutional. The majority opinion stated that it was not the business of the state to write prayers for public school children. The Court said that the recited state-written prayer was inconsistent with the establishment clause since it can be construed as a government-sponsored religious activity. "When the power, prestige, and financial support of government is placed behind a particular religious belief," said the Court, "the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." The Court added, "government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally-sponsored religious activity."

2. *Lemon v. Kurtzman*, 403 U.S. 602 (1871): The U.S. Supreme Court held that the law was is violation of the establishment of religion clause of the First Amendment. Chief Justice Burger's opinion began by admitting that the Court "can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of the law." While it found that the purpose of the law was clearly secular, the Court held that for many of the reasons listed in the "Against" column, the cumulative impact of the entire relationship arising under the statute involved excessive entanglement between government and religion.

3. *Everson v. Board of Education*, 330 U.S. 1 (1947): In a 5 to 4 ruling the court upheld the reimbursement act as constitutional. Justice Black, writing for the majority stated:

> [W]e cannot say the First Amendment prohibits [the state] from spending tax-raised funds to pay bus fares of parochial school pupils as part of a general program under which it pays the fares of pupils attending public and other schools. It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church school if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State.... Similarly parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections with sewage disposal, public highways and sidewalks. Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function would make it far more difficult for the school to operate. But such is obviously not the purpose of the First Amendment. The Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.... The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.

4. *Lynch v. Donnelly*, 465 U.S. 668 (1984): In upholding the city's display the Supreme Court held that the total separation of religion and government was not possible. Furthermore, the Court reasoned, days like Thanksgiving and Christmas have long been national holidays, during which even federal employees were given the day off. The Court found that there was a secular purpose for the display of the nativity scene -- to celebrate the holiday season and to depict the origins of that holiday. In addition, because the creche is "a traditional symbol" of Christmas, a holiday with strong secular elements, and because the creche was "displayed along with purely secular symbols," the creche's setting "changes what viewers may fairly understand to be the purpose of the display" and "negates any message of endorsement" of "the Christian belief represented by the creche" (J. O'Connor, concurring).

   Subsequently, in *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 109 S.Ct. 3086 (1989), the Court, in a 5-4 decision, held that it was constitutionally impermissible for a county to erect a Christian nativity scene in the county courthouse. Bereft of the non-religious elements of the display in *Lynch*, "nothing in the context the display [in *County of Allegheny*] detracts from the creche's religious message," the Court said. Here, it concluded, the county "has chosen to celebrate Christmas in a way that has the effect of endorsing a patently Christian message: Glory to God for the birth of Jesus Christ." In the same case, the Court upheld the constitutionality of a city's display of a 45 foot Christmas tree and a 18 foot hanukkah menorah accompanied by a sign saying, "During this holiday season, the City of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom." The Court concluded that the "sign serves to conform what the context already reveals: that the display of the menorah is not an endorsement of religious faith but simply a recognition of cultural diversity."

5. *Marsh v. Chambers*, 463 U.S. 783 (1983): The legislature in question was Nebraska's and the objecting legislator was Omaha's Ernie Chambers. In an opinion by Chief Justice Burger the Court upheld the constitutionality of the practice of legislative prayers. Interestingly, the Court did not even mention the *Lemon* test. Rather the Court relied on the historical tradition of legislative prayer. The Court stated that since Congress has maintained, without interruption, the tradition of selecting a chaplain to open each session since the First Congress, the Framers of the Constitution must have intended that this practice not be considered a violation of the establishment clause. The evidence is even stronger, the Court explained, when we consider that many of the same persons who drafted the Bill of Rights were the representatives of their various states in the First Congress. If these persons had wanted legislative prayer to be banned by the First Amendment, they would not have allowed the practice to begin immediately in Congress. Furthermore, the Court reasoned that legislative prayer had been in practice in the Nebraska legislature for over a century -- a practice unbroken since before Nebraska became a state. The Court also relied on the fact that the person complaining of the practice (Senator Chambers) was an adult and, therefore, presumably not readily susceptible to religious indoctrination or peer pressures as might school-aged children who were the concern of the prayer-in-school cases.

6. *Board of Educ. of Westside Com. Schools v. Mergens*, 110 S.Ct. 2356 (1990): This case involving a Nebraska high school differs in several respects from the hypothetical situation. In *Mergens*, a request by a group of students for permission to form a Christian Bible Study Club was denied by the school board. The students sued claiming the board's action deprived them of their First Amendment rights of freedom of speech and free exercise of religion and was contrary to the federal Equal Access Act. The Equal Access Act makes it unlawful for any public secondary school that receives federal financial assistance and that is a limited open forum to deny equal access to its facilities -- on the basis of religious, political, philosophical, or other content of speech -- to students who want to conduct a meeting. The Act says a school is a limited open forum whenever the school allows one or more noncurriculum-related student groups to meet on school premises.

   The U.S. Supreme Court found for the students and held that the school violated the Equal Access Act. The Court said that the school was a limited public forum because it allowed noncurriculum-related groups such as the Chess Club to meet.

   More importantly for the purposes of this activity, the Court rejected the school district's defense that allowing religious groups equal access to its facilities would violate the establishment of religion clause. Permitting such groups to meet, the Court concluded, would have the secular purpose of providing a forum for the exchange of ideas between students and of preventing discrimination against religious speech.

The Court also said that allowing student religious meetings at the school would not have the primary effect of advancing religion. "Secondary school students," the Court concluded, "are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." This is especially true because the Equal Access Act limits the participation by school officials at meetings of student religious groups and requires that the groups meet during noninstructional time. Furthermore, "to the extent that a religious club is merely one of many different student-initiated voluntary clubs, students should receive no message of government endorsement of religion." Finally, the Court held that allowing the group to meet was less likely to entangle the school with religion than a policy of religious censorship that would require the school not only to define "religious speech," but also to constantly monitor the meetings of student groups.

7. *Edwards v. Aguillard*, 482 U.S. 578 (1987): The Supreme Court held that this law, enacted by the Louisiana legislature, violated the establishment clause. The majority concluded that the law's legislative history showed its purpose was to promote a particular religious view. The Court concluded:

> The Louisiana Creationism Act advances a religious doctrine by requiring either the banishment of the theory of evolution from public school classrooms or the presentation of a religious viewpoint that rejects evolution in its entirety. The Act violates the Establishment Clause of the First Amendment because it seeks to employ the symbolic and financial support of government to achieve a religious purpose.

The idea for this activity came, in part, from an activity by the National Archives that appeared in the Winter 1987 issue of ***Update on Law Related Education****, published by the American Bar Association. It is used with the permission of the American Bar Association.*

Activity 5-D: No Photographs Please -- A Free Exercise of Religion Activity

Purpose: To familiarize students with the competing interests of freedom to exercise one's religious beliefs versus government's duty to protect its citizens.

Student Materials: No Photographs, Please,
hypothetical case, pp. 49-50
Precedent cases, pp. 51-54.

Directions:

1. Review with the class the introductory material on the use of precedents and the *Phramed v. Nebraska* case, pp. 49-50.

2. Divide the class into small groups and instruct each group to read and discuss the precedent cases on pp. 51-54. The group should compare the facts and reasoning of each of the precedent cases with those of the *Phramed* case and with each of the prior precedent cases. For each of the precedent cases they should discuss how that case, in combination with the precedent cases previously discussed, will affect the outcome of the *Phramed* case. Before the groups begin their discussions you may wish to list for the class some of the factors the courts have historically looked at when deciding free exercise of religion cases: whether the state action involved seeks to regulate religious beliefs or merely religious practices, whether the state action in question is designed to interfere with religious beliefs or practices (like a law that says that no one can worship the sun god) or is designed for some other purpose, but incidently interferes with religious practices (such as child abuse laws which categorize the withholding of medical assistance to one's child as abuse, even though the supplying of medical help may be in violation of some individuals' religious beliefs), whether the religious belief of the individual affected is a deeply-held and sincere one, the degree to which the state action burdens the free exercise of religion, the importance of the government's interest in regulating the behavior in question, and the extent to which the state action interferes not only with one's free exercise of religion, but with other fundamental rights -- such as freedom of speech -- as well.

3. Lead a discussion of the conclusions of the various groups.

Comments on the Precedent Cases:

1. *Torasco v. Watkins*: Here the Court struck down a law that was clearly aimed at religious belief -- one had to believe in God and swear to that fact. The free exercise of religion clause of the First Amendment prohibits governmental interference with religious beliefs. In *Phramed* the government is not interfering with what Julia can believe; they are, however, preventing her from acting on those beliefs and still have a drivers license.

2. *Reynolds v. U.S.*: The Court draws a distinction between religious beliefs and religious action. While government cannot proscribe or prohibit religious beliefs, it can regulate religious practices. Why the Mormons' religious belief in polygamy seems to be sincere, the Court appeared to believe that they were dangerous -- that they threatened "the fabric of society." Would allowing Julia to have a drivers' license without her photograph also be dangerous? Notice also that unlike the situation in *Torasco*, the law here is not directed at a particular belief or practice (a non-belief in God), but rather makes polygamy illegal for everyone. It does not matter whether a person's desire to have more than one wife at a time is motivated by religious reasons or not; polygamy is against the law.

3. *Fowler v. Rhode Island*: Here again we have a law that concerns religious action, not merely belief. Note, too, that it is directed at all religious or political addresses in city parks, not at just religious addresses or at particular religious address. Unlike the law against polygamy in the *Reynolds* case, however, the law here is struck down. Is this because the city does not have an important enough reason to interfere with Fowler's religious activities? Is it because freedom of speech is also involved? Are the reason the State of Nebraska gives for its requirements that drivers' licenses have the driver's photo on them in *Phramed* important enough to interfere with the right of Julia to practice her religious beliefs?

4. *State v. Pack*: Here again we have a rule against dangerous conduct that applies to everyone, not just to those people who practice certain religious beliefs. The court spells out a widely accepted test for the constitutionality of religious acts -- a test that balances the degree to which a law burdens the free exercise of religion against the importance of the government's interest in regulating certain behavior. Seemingly, that was the test applied in *Reynolds* and *Fowler*. How do they balance out in *Phramed*?

5. *In re Estate of Brooks*: Here the balance appears to come out in favor of the individual's religious practices. Is this consistent with *Peck*? Perhaps the difference is between subjecting oneself (and others) to dangerous deadly activities and merely refusing life saving treatment for oneself.

6. *Wisconsin v. Yoder*: The educational beliefs of the Amish were found to be long-standing and sincere ones and the harm caused by not subjecting them to the states's compulsory education laws was viewed as being not too serious in view of the Amish lifestyle. Julia's beliefs also seem to be sincere. Are the state's interests in *Phramed* stronger or weaker than those in *Yoder*? Note that this case involves both the issue of religious freedom and the issue of the right of parents to control their children's education.

7. *U.S. v. Kuch*: Here not only does the government seem to have a compelling reason to limit the group's religious practices, but it is questionable whether the group's religious beliefs are sincere ones.

8. *Employment Division, Department of Human Resources of Oregon v. Smith*: In a controversial decision, the Court seems to throw out much of what has been discussed thus far. The balancing test, the Court declares, does not need to be made. If government passes a valid law that is not aimed at religious beliefs or action, that law can be enforced against everyone, even those people who can legitimately claim that the law interferes with their ability to act upon sincere and deeply-held religious convictions. It does not matter that complying with the law burdens the free exercise of their religion or that the government does not have a compelling reason to enforce it. The Court explained away decisions like *Fowler* and *Yoder* by saying that these cases also involved other important constitutional rights such as freedom of speech or the right to control the education of one's children. As the *Brooks* case also involves the right of privacy -- the right to control one's body -- this distinction could explain that decision as well. As the requirement that drivers' licenses contain a photo of the driver applies to all drivers and as another constitutional right does not seem to be involved, it seems that Julia would lose the *Phramed* case under the rationale of *Smith*.

How far will the Court's decision in *Smith* reach? Could a state constitutionally prohibit the drinking of intoxicating beverages without making an exception for religions that make the drinking of wine part of their sacrament? Could a state's laws against discrimination on the basis of sexual orientation require a religious institution that considers homosexuality a sin not to discriminate against homosexuals who apply to the institution for a job? The answers are unclear at this time, but these are interesting questions to raise with your class.

Phramed v. Nebraska (*Quaring v. Jensen*, 728 F.2d 1121 (8th Cir. 1984):

The actual case on which then *Phramed* hypothetical was based was decided prior to the Supreme Court's decision in *Smith*. In *Quaring v. Jensen* the Circuit Court determined that Nebraska's requirement of a photograph on the driver's license in Ms. Quaring's situation was a violation of the constitutional right to free exercise of her religious beliefs.

The Court determined that the fact that her belief was not shared by all members of any particular religious sect does not prevent her belief from being protected. The Court used a three-part test to decide whether the law requiring photographs on driver's license violated Ms. Quaring's rights.

First, she must demonstrate that her refusal to allow the photo is based upon a sincerely held religious belief. She does so by the facts that her belief is based on a passage from the Scripture; her belief has the necessary support from historical and biblical tradition (i.e., it is not something she made up recently, but is a belief which has been held for centuries by many other people); and her belief plays a central role in her daily life (e.g., no photos in her house, no paintings of any of God's creations, etc.)

Second, does the law place a substantial pressure upon her to modify her behavior and violate her beliefs? Yes. A fundamental precept of her beliefs is to have no photographs in her life. But without the driver's license she cannot drive to her bookkeeping job 10 miles away, nor can she assist her husband in their farming and ranching operations as she had needed to in the past. Therefore, if she wants to continue to live as she has for years, she must violate her belief to conform to the state law.

Third, the court must balance the state's interests against the burden on her religion. The photograph requirement on the license is not the least restrictive means of achieving a compelling state interest. The state claims: 1) photos are needed for quick and accurate identification of drivers -- but this cannot be compelling because the state allows exemptions and out of state drivers do not always have photo identification; 2) the photos are necessary for security in financial transactions (e.g., cashing checks) -- but this is not a valid reason because there are many people without licenses who are in the same situation as Ms. Quaring would be without a photo on her license and the financial institutions may simply refuse to do business with persons without photo identification if they so choose; and 3) the administrative burden of having to consider requested exemptions is not strong enough to outweigh the burden placed upon Ms. Quaring's religious beliefs.

The decision was appealed to the U.S. Supreme Court, but no opinion was issued because the vote was a 4-4 tie. Justice Powell was ill and did not participate in the case. Whenever there is a tie vote, the decision of the lower court stands. Therefore, in this case the decision of the Eighth Circuit was the final decision.

Alternative Activity

A non-traditional way to deal with case studies is one which involves the use of collages. This strategy works well with slow learners and students who are reluctant to participate in free-wheeling discussion sessions.

1. Divide the class into eight groups. Assign one of the precedent cases to each group.
2. Give each group a sheet of butcher block paper or posterboard, a stack of magazines, glue and scissors, and the description of the case.
3. Explain that each group will make a collage -- words, pictures, or cartoons pasted on a large piece of paper in such a way as to give the feeling of being one large picture. The collage is supposed to portray the group's feelings or point of view.
4. Instruct the groups to show the facts and opinion of their cases with pictures, words, and cartoons.
5. Direct each group to present its collage to the class by explaining the collage, reporting on what the group sees in the collage, and describing the feelings they get from the collage.
6. Help each group lead a class discussion comparing the case represented in its collage with the *Phramed* case and with the cases already presented in the collages of other groups.

STUDENT MATERIALS

Activity 5-A

In Pursuit of Religious Freedom

In colonial America compulsory support of state established religions and persecution of religious dissenters was the rule rather than the exception. New York enacted a law under which Catholic priests were forbidden to teach or practice Catholic doctrines or rites or they would suffer perpetual banishment. In Virginia, denial of the Trinity was punishable by imprisonment for three years, and a Unitarian or Freethinker could have his children taken from him because his religious beliefs made him unfit to raise them. Several religious dissenters were in jail in one Massachusetts community for declining to pay support for the state established church.

The Church of England (or Anglican Church) was established by law in five colonies: Georgia, Maryland, North Carolina, South Carolina, and Virginia; and the Congregational Church, a dissenting group in England, established their church in Connecticut, Massachusetts, and New Hampshire. Even though these three did not formally separate their religion from the state until many years after the American Revolution (Connecticut -1818, New Hampshire -- 1816, and Massachusetts -- 1833) the principles of freedom of religious exercise and separation of church and state were widely accepted by the people of the new republic at the time of the adoption of the First Amendment in 1791.

The sources of these unique American traditions of religious freedom and separation of church and state are many and varied. Although every factor may not have been acting in every place at all times, each of the eight factors discussed below played a significant role in bringing forth this result.

Geographical Considerations

The distance across the Atlantic Ocean made effective church administration difficult. The Church of England, for example, did not appoint a bishop in America until after the colonies had been in operation for many years. This meant that any questions regarding how the church authorities were to act in America had to either be settled in America or sent across the Atlantic and wait for a response -- a process which would take months.

Just as the distance across the Atlantic made church administration difficult, the distances and hardships of travel within the colonies themselves proved a barrier to effective church administration. The clergy were plainly not able to travel over the vast distances some of their parishes extended. This meant that American colonists were quite often on their own in matters of religion.

Lack of Affiliation With Churches

During the last half of the 18th century only a small minority of Americans were formal members of any church. The best estimate is that church affiliation in 1787 was limited to four percent of the total population.

A number of factors may explain the minute percentage of formal church membership at the end of the colonial period. Most importantly though, preoccupation with making a living on the tough frontier made formal church membership impossible for many. Instead the Americans were probably religious, but mostly in a personal, unorganized way.

This "prevalence of the lack of formal church affiliation obviously contributed to the growing movement toward religious liberty and disestablishment. Persons not themselves connected with any churches were not likely to persecute others for similar independence. Nor were they likely to [be willing to pay] compulsory taxation to support a church to which they did not belong."

Economic Considerations

If the colonies had restricted their populations to only those affiliated with the established church, many emigrants would have been barred from entry. That would have left the colonies short on the manpower needed to make them economically profitable. Each of the colonies desperately needed as many emigrants as possible. There were not enough people from the state established religions in Europe who were willing to make the arduous journey and start a totally new life in a strange and sometimes hostile new land. Therefore, the colonies had to accept whomever was willing to come to America, regardless of their religious beliefs.

Also, the contacts and travel necessary to engage in successful trade and commerce tended to distract the colonists from religion and made them concentrate on business. The business contacts with persons of differing religions often tended to soften the intolerance of established religions.

Religious Diversity

By some estimates there were more than 700 Congregational churches; 400-500 each of Anglican, Baptist, and Presbyterian; 200-250 each of German Reformed, Lutheran, and Quaker; 125 Dutch Reformed; 80 Moravian; 70 Mennonite; and 60 Roman Catholic. There were also a variety of smaller groups such as the Methodists. This diversity not only made it impossible for any one religious sect to establish itself as the national religion, it also made continuation of the state religious establishments difficult and short-lived. The number of religious groups dissenting from the state established religions also made elimination of those groups impossible and forced groups to learn to live together.

Believers In Religious Freedom

Roger Williams and William Penn were two of the most prominent individual believers in religious freedom during the colonial period. Roger Williams, after being banished from the Massachusetts Bay Colony in the winter of 1635-1636, was the founder of Rhode Island and instrumental in establishing it as a haven of religious liberty. Numerous religious groups settled in Rhode Island because of the tolerant policies of the state government toward religious beliefs.

William Penn, the proprietor of Pennsylvania, advertised for settlers by promising toleration of any religious belief "as every person shall in conscience believe is most acceptable to God." At least partly responsible for Penn's tolerance was his own imprisonment for his religious convictions -- he was a Quaker.

While both Rhode Island and Pennsylvania were great religious experiments and provided examples of how religious freedom could work for everyone's benefit, it must be pointed out that neither colony granted religious freedom without some limits. Political privileges were often restricted to Protestant Christians -- Jews and Catholics alike suffered some form of restraint at one time or another in even these two liberated colonies.

It should also be pointed out that in addition to the individuals who spoke up for religious freedom, certain religious sects were vigorous advocates of religious freedom and separation of church and state. Among the most vociferous were the Baptists, the Quakers, and the Presbyterians.

Enlightenment

Thomas Jefferson's Virginia Bill for Establishing Religious Freedom, passed in 1785, states in part:

> That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or beliefs; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or effect their civil capacities.

That statement best sums up the ideas of Enlightenment thought. It is significant that not only Jefferson, but James Madison, George Washington, Thomas Paine, and John Adams, among others, espoused beliefs and theories strongly influenced by Enlightenment thought.

Most of the evidence we have makes it reasonable to believe that not only the leaders but the overwhelming majority of Americans in 1787 believed as Thomas Paine did when he wrote in *Common Sense*:

> As to religion, I hold it to be the indispensable duty of government to protect all conscientious professors thereof, and I know of no other business which government hath to do therewith.

The Great Awakening

The Great Awakening was an evangelical religious revival, starting in the mid-18th century in New England. The emphasis was on the rights and duties of the individual's conscience. Religion was viewed as a personal thing and the individual's conscience had to answer solely to God. "The movement constituted a break with formal church religion, and developed a resistance to coercion by established churches." These groups forming the heart of the Great Awakening movement became strong supporters of the separation of church and state.

The Revolutionary War

Religious freedom was significantly cultivated by the War for Independence. Wars generally tend to unify a population, and this was especially true of the Revolutionary War, grounded as it was on the belief that all men are created equal. Religious discrimination did not fit within the basic tenets of the founding of the new republic -- freedom and equality for all men.

Practical considerations also played a significant role in furthering religious freedom. Dissenting religious groups were relieved of the burdens of mandatory attendance at and mandatory donations to the state established church, in exchange for their support of the war and service in the armies of the new republic. Concessions were made to Catholics to not only assure their allegiance and support for the new republic, but to obtain the assistance of Catholic Canada, France, and Spain.

The Bill of Rights

In the climate created by all of these factors, the first ten amendments to the Constitution -- the Bill of Rights -- were practically demanded by the people of the new republic. In 1791 the Bill of Rights was ratified. Included were these first sixteen words of the First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

QUESTIONS FOR TEAM COMPETITION

1. Name at least three of the five colonies in which the Church of England (Anglican) was established by law.

2. Which state had a legally established state religion until 1833, when a constitutional amendment separating church from state was finally ratified?

3. Who was the person expelled from Massachusetts Bay Colony for advocating separation of church and state, and who went on to establish a haven of religious freedom in Rhode Island?

4. Name the person who was the proprietor of Pennsylvania.

5. Explain how geography contributed to the rise of religious freedom in America.

6. Explain how the fact that only a small percentage of American colonists were formal church members contributed to the rise of religious freedom in America.

7. How did religious diversity strengthen the growth of religious freedom in America?

8. What role did economic factors play in the growth of religious freedom in America?

9. Explain why Rhode Island and Pennsylvania were not the perfect examples of absolute religious freedom.

10. Name two of the three religious sects who were the most vigorous advocates of religious freedom and separation of church and state.

11. Explain the basic concepts of Enlightenment thought.

12. Explain how the Revolutionary War exercised a significant influence on the development of religious freedom in America.

13. Describe The Great Awakening and its influence on separation of church and state.

14. In what year was the Bill of Rights ratified?

15. Describe two of the examples from the reading of injustices suffered by American colonists because of their religious beliefs.

16. If the Bill of Rights became part of the Constitution in 1791, how could some states continue to have state-approved churches into the 1800's?

Activity 5-B

The Sunset Proclamations

Read the following hypothetical situations. For each hypothetical answer the following questions:

1. *Does the law or government action in this situation violate the First Amendment?*

2. *If so, what part and why? If not, why not?*

A. In the Year 2000 Congress passes a law that states:
Each day at dusk all citizens must stop all activities and devote at least five minutes to the worship of the sun.

B. In the year 2004 Congress, with many newly elected Senators and Representatives, decides to stamp out the cult of sun worshippers. It repeals the prior law and passes a new law that states:
Any person found worshipping the sun shall be subject to federal prosecution and possible fine and/or imprisonment.

C. In the year 2010 Congress repeals this law and passes a new law that states:
No one who is not a member of the Church of the Sunset Worship may attend any public school or hold any public office.

D. By the year 2020 the Church of the Sunset Worship, no longer favored by Congress, is down to only a handful of members. Carla, the five-year-old child of a Sunset Worshipper, is involved in a serious accident. She has lost a lot of blood. The doctors at the hospital to which she is taken agree that Carla will die in a few hours unless she is given a blood transfusion. Carla's parents refuse to permit the transfusion. They say that blood transfusions are against their religious beliefs. They believe that Carla will be cured, if it is the will of the sun god, if she is left to lie in the sunlight. A state judge orders the doctors to give Carla the blood transfusion.

Activity 5-C

What Constitutes an Establishment of Religion?

The First Amendment prohibits government from establishing religion. But what exactly does that mean? A narrow interpretation of the establishment clause would restrict its meaning to the establishment of a church state. However, in the first major establishment case brought before the Supreme Court, *Everson v. Board of Education*, 330 U.S. 1 (1947), the justices interpreted the clause in a broad manner. Wrote Justice Hugo Black:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state or the Federal Government can, openly or secretly, participate in the affairs of any religious organization or groups and vice-versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."

In the case of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), Chief Justice Warren Burger developed a three-part test to help guide establishment clause decisions. Actions could be taken by government without violating the establishment clause if:

1. they had a secular (non-religious) purpose,
2. their principal effect was not to advance or hinder religion, and
3. government would not become too entangled with religion
    a. by requiring that the government closely monitor the activity too make sure that church and state were not becoming intertwined, or
    b. by increasing the likelihood of political divisiveness along religious lines.

*The following fact situations all involve government action and religion. Listed below each fact situation are arguments contending that the state action does not violate the establishment clause of the First Amendment ("**for**" arguments) and arguments supporting the position that the state action violates the establishment clause ("**against**" arguments). For each fact situation thoroughly examine each argument and then take a position for or against the constitutionality of the state action.*

1. State law requires each public school classroom to begin the day with the following prayer:

> Almighty God, we acknowledge our dependence upon Thee, and beg thy blessing upon us, our parents, our teachers, and our country.

Those who object to saying the prayer may remain silent or ask to be excused during the prayer.

For

- This simple non-denominational prayer does not constitute the establishment of an official state religion.
- To deny the use of prayer would indicate contempt for religion and spirituality.
- Pupils do not have to recite the prayer if they do not want to; they may remain silent or leave the room.
- To deny the right of the children to recite the prayer is to ignore the spiritual heritage of the nation.
- The First Amendment requires a wall of separation between church and state not a iron curtain; government is not supposed to be hostile toward religion.

Against

- The fact that the prayer was composed by government officials makes the prayer a state-sponsored religious belief violating the First Amendment.
- Leading the prayer involves the time and effort of the teachers and staff of the school.
- Saying government mandated prayers is contrary to the beliefs of many Americans and is offensive to them.
- Saying prayers favors religion over non-religion.
- Even though the pupils can remain silent or leave the room during the prayer, such actions can cause embarrassment and can put these students under considerable social pressure.

2. A state passes a law providing state financial assistance to supplement the salaries of teachers of secular subjects in non-public elementary schools. Many of these non-public schools are run by churches and teach about a particular religion. The money is to be paid directly to the teachers and cannot be in excess of 15 per cent of their current salary. Teachers eligible for this financial assistance must use only the teaching materials which are used in the public schools. They must also agree in writing not to teach a course in religion as long as they receive the salary supplement.

For

- Religious schools perform two separate functions: (1) provide secular education, and (2) teach the tenants of a particular faith. The state can aid in the first function without being involved in the second.
- People concerned about religious values can teach secular subjects without having those values affect the content of what they teach. Teachers in public schools do that everyday.
- The law was not intended to advance religion, but rather to enhance the quality of secular education.
- Teachers have promised not to teach religion. There is no reason to believe they will not keep their promise.

Against

- The parochial school system is an integral part of the religious mission of the church.
- What taxpayers give for secular purposes under the statute enables the parochial schools to use more of their own money for religious training.
- Various aspects of a parochial school's program -- the nature of its faculty, its supervision, decor, program, extra-curricular activities, assemblies, courses, etc. -- produce a general religious atmosphere, even for secular subjects.
- To ensure that the special safeguards of the statute (teach only subjects offered at and use only books used at public schools) are obeyed, continuing state surveillance will be required, thus impermissibly entangling church and state.

3. A rural school district does not have any high schools. When children in the district graduate from elementary school, they go to high school outside of the district. The parents of these children pay for bus transportation to take their children to three public high schools and four parochial school outside the district. Under state law the school board has the authority to pay for this bus transportation and it does so by reimbursing the parents for this expenditure.

For

- Private schools, including parochial ones, fulfill a public function -- the education of students -- and aid given as part of the state's educational function does not violate the Constitution.
- The providing of financial assistance for transportation directly aids the students and their parents. The assistance to religious schools is only incidental and indirect.
- There is little difference between the assistance provided here and the provision of state-paid police assigned to protect children going to and from such schools from the hazards of traffic.
- As some children may not be able to go to parochial school without this financial assistance, to deny it would be interfering the their free exercise of religion.
- The reimbursement program has a clear secular purpose. Its primary effect is to aid the student and the student's family, not to aid the church, and no supervision of the school's program by the state is required.

Against

- The cost of transportation to school is part of the cost of education and the education the parents want the children to receive in these schools is not merely secular, but religious as well.
- The state may not make public business of religious worship or instruction or of attendance at religious institutions of any character.
- If the state may aid religious schools it may also regulate them, and this, of course, the Constitution forbids.
- It makes no difference whether beneficiary of these tax-raised funds is primarily the parochial school and incidentally the pupil, or whether the aid is bestowed directly on the pupil with indirect benefits to the school. The First Amendment cannot be circumvented by a reimbursement of expenses to individuals.
- As some parents may not send their children to a church-sponsored school if transportation were not provided as it is for public school children, the reimbursement system clearly aids religion.

4. Each year a city erects a Christmas display as part of its observance of the Christmas holiday season. The display is located in a park situated in the heart of the city's downtown shopping district. The display is comprised of many of the figures and decorations traditionally associated with Christmas including, among other things, a Santa Claus house; reindeer pulling Santa's sled; candy-stripped poles; a Christmas tree; carolers; cutout figures representing such characters as a clown, an elephant, and a teddy bear; hundreds of colored lights; a large banner that reads "SEASON'S GREETINGS;" and a creche (manger scene). The erection and dismantling of the creche costs the city about $20 per year. Some residents of the city object to the inclusion of the creche in the display and claim that it violates the establishment clause.

For	Against
- The creche, viewed in the proper context of the Christmas holiday season, has the clear secular purpose of celebrating the holiday, depicting the origins of that holiday, and stimulating holiday shopping.	- The city's inclusion of the creche in its Christmas display does not reflect a clear secular purpose. The inclusion of a distinctively religious element like the creche demonstrates that a sectarian purpose was behind the decision to include a nativity scene. The city understood that the inclusion would serve the wholly religious purpose of "keeping Christ in Christmas."
- As the creche is a traditional symbol of Christmas, a holiday with strong secular elements, and as the creche is displayed along with purely secular symbols, viewers will understand that in this setting the creche is not an endorsement of the Christian beliefs represented by the creche.	- The primary effect of the creche is religious, not secular. By including the creche in the display the city is approving the particular religious belief that the creche exemplifies. The effect on people of other faiths, as well as on those who may reject all religion, is to convey the message that their views are not similarly worthy of public recognition nor entitled to public support.
- This situation does not involve an excessive entanglement of government and religion. The city already owns the creche and expenditures for it erection and maintenance have been minimal.	- The inclusion of creche raises the possibility of political divisiveness that can divide the city along religious lines.

5. A state government pays a chaplain to open each legislative session with a prayer. A member of the legislature claims this practice violates the establishment clause of the First Amendment.

For

- The opening of sessions of legislative bodies with prayer is deeply embedded in the history and tradition of the U.S. The First Congress, the very body that wrote the First Amendment, authorized the appointment of paid chaplains for the House and the Senate.
- The fact that some opposed the creation of House and Senate chaplains -- like John Jay and James Madison -- on establishment of religion grounds does not weaken the force of the historical argument. It shows, in fact, that the subject was considered carefully and given great thought.
- Every session of the U.S. Supreme Court begins with an announcement that concludes, "God save the United States and this Honorable Court."
- The person who is objecting to the practice is an adult who it is assumed is not readily susceptible to religious indoctrination or peer pressure. Any legislator who objects to the practice can simply stay away until the prayer is concluded. Thus the case differs from the issue of prayer in public schools.

Against

- The Constitution is not a static document whose meaning in every detail is fixed for all time by the life experiences of the Framers. Members of the First Congress should be treated, not as sacred figures whose every action must be followed, but as authors of a document meant to last for the ages.
- The purpose of legislative prayer is clearly religious, not secular. Prayer is by definition religious.
- The primary effect of legislative prayer is clearly religious. Prescribing a certain form of religious worship, even if the individuals involved have the choice not to participate, pressures minorities to conform to the officially approved religion. The fact the prayer takes place in the legislative hall links religious belief and observance to the power and prestige of the State.
- The practice of legislative prayer leads to excessive entanglement between the State and religion. The state has to pick a suitable chaplin and insure that the chaplin limits himself or herself to suitable non-sectarian prayers. In addition the issue has proven to be politically divisive, as this lawsuit demonstrates.

6. A local board of education policy allows use of school facilities by student clubs and organizations including those that are religiously oriented. Accordingly, it allows a student Christian Bible Study Club to meet at the local high school.

For

- To deny the students the right to religiously-oriented extra-curricular activities would violate the students' freedom of expression as other kinds of extra-curricular activities are allowed. Such content-based discrimination is not allowed under the First Amendment.

- Allowing the bible study club to meet has clear secular purposes: to allow an exchange of views among students, to allow students equal access to school facilities.

- The policy does not have the primary effect of advancing religion because merely allowing an extra-curricular club to meet does not confer any stamp of state approval on religious practices or beliefs, and because the religious group is only one of many that benefit from the open access policy.

- An equal access policy is less likely to entangle the school with religion than a policy of religious censorship which would require the school board to define religious activity and the school to monitor the meetings of school groups.

- A policy that discriminates against religious groups would itself violate the equal protection clause because it would constitute a unjustifiable hostility to religion.

Against

- Not permitting the group to meet would not violate the students' freedom of expression as it is necessary to distinguish between religious and non-religious speech under the establishment clause. For example, it would be permissible to allow a class to put on a play and to not permit it to conduct a religious service.

- The group's free speech rights are not severely hampered by a policy that would deny them access to the school. There are many places close to the school that they can meet for bible study.

- Permitting a student religious group to meet in a public high school impermissibly advances religion by using the tax-supported public school system to aid religious groups to spread their faith.

- School plays a unique role in transmitting basic and fundamental values to youth. To an impressionable student even the mere appearance of secular involvement in religious activities might indicate that the state has placed it seal of approval on a particular religious creed.

- As the school district is responsible for school safety and discipline, teachers need to supervise all student activities. Such faculty involvement is excessive entanglement between the state and religion.

7. A state legislature passes a law that forbids the teaching of the theory of evolution in public schools unless accompanied by instruction in "creation science." No school is required to teach evolution or creation science; if either is taught, however, the other must be taught. The law states that its purpose is to protect the academic freedom of students.

For

- Creation science is a collection of scientific data supporting the theory that the physical universe and life within it appeared suddenly and have not changed substantially since appearing. It can be presented in the classroom without any religious content.
- We should not assume that a law's purpose is to advance religion merely because it happens to coincide with the tenets of some religion.
- The establishment clause forbids not only state action motivated by a desire to advance religion, but also that intended to disapprove, inhibit, or evince hostility to religion. Thus, if the legislature sincerely believed that the state's science teachers were hostile to religion it can choose to try to eliminate that hostility without violating the establishment clause.
- The purpose of the legislature was to preserve the students' academic freedom. The legislature wanted to ensure that students would be free to decide for themselves how life began based on a fair and balanced presentation of the scientific evidence.

Against

- The theory of creation is that matter, the various forms of life, and the world were created by God out of nothing. This is a religious belief.
- It is clear that the intent of the legislature was to discredit evolution by counterbalancing its teaching at every turn with the teaching of creation, a religious belief.
- The clear purpose of the legislation is to advance the religious viewpoint that a supernatural being created humankind.
- There is nothing unconstitutional about teaching a variety of scientific theories about the origins of humankind to schoolchildren. Teachers have the academic freedom to do that now without this law. But if the purpose of the law is to endorse a religious doctrine, the law violates the establishment of religion clause.
- Whatever the academic merits of particular subjects or theories, the establishment clause limits the ability of state officials to pick and choose among them for the purpose of promoting a particular religious belief.

- Belief in evolution is a central tenet of a religion called secular humanism. By ignoring creation science and instructing students in evolution, public school teachers are now advancing a religion in violation of the establishment clause.

Activity 5-D

No Photographs Please: A Free Exercise of Religion Activity

Precedents, which are previous court decisions involving similar questions, provide a major source of information used to decide cases. Court decisions on legal issues are usually written. These written decisions serve as precedents in future cases. When cases come to court, judges refer to the precedents set in earlier cases to help them decide the case before them. For example, what would a judge decide if a defendant accused of armed robbery informed the judge that he could not afford an attorney? The judge would first see if that issue had arisen in a previous case. Because the United States Supreme Court in *Gideon v. Wainwright,* 372 U.S. 335 (1963), ruled that a defendant must be provided with an attorney at the state's expense, the judge would follow that precedent.

Below is the case of *Phramed v. Nebraska*. Assume this case has been appealed to the U.S. Supreme Court. Following the case are descriptions of previous court decisions involving the free exercise of religion. Compare each of these cases to the *Phramed* case and to each other. How are the facts and the main questions the court had to decide in each of these cases alike and how are they different from those of the *Phramed* case? Is the decision the court reached in each of these cases the right decision for the *Phramed* case? In other words, how useful are each of these cases as precedent in deciding *Phramed*?

Phramed v. Nebraska

Julia N. Phramed had held a Nebraska driver's license for years. She had repeatedly passed the test required to renew her license.

Recently the Nebraska legislature passed a law requiring photographs on all Nebraska drivers' licenses, with some exceptions -- for learners' permits, etc. Julia, because of her religious beliefs, refused to have her photograph taken for the license. Therefore, the Nebraska Department of Motor Vehicles denied her application for a license.

Julia filed suit in U.S. District Court to force the state to grant her a license without a photograph affixed, claiming to refuse to do so was a violation of her constitutional right to free exercise of her religious beliefs. Julia believed in a literal interpretation of the Second Commandment:

> *Thou shalt not make unto thee any graven image or likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth.*

Julia sincerely believes that she would violate the Second Commandment by having her photograph taken for her license, because that would be making a likeness of one of God's creation -- herself. Julia's belief is so strong that she possesses no photographs of any of life's momentous events -- e.g., her wedding, or her family -- no television, and no decorations depicting flowers, animals, or other living things in her home. Although she is not a member of any organized church, she does attend an Episcopal Church in a nearby town. She readily admits that the church does not share her belief regarding photographs, but that it is her own individual interpretation of the Bible.

The state's refusal to grant her a driver's license imposes a hardship upon Julia. She uses her automobile to drive to and from her bookkeeping job 10 miles away and to assist her husband with the farming and ranching operations.

The District Court decided that the state of Nebraska has a right to require Julia to affix a photograph to her license because of the state's important interest in providing a quick and accurate means of identifying drivers and of providing security for financial transactions -- identification for cashing checks, etc.

The Eighth Circuit Court of Appeals affirmed the decision of the District Court. The case is now on appeal to the U.S. Supreme Court.

Precedent Cases

1. *Torasco v. Watkins, 367 U.S. 488 (1961).*
Torasco was appointed to a government position by the governor of Maryland, but was declared ineligible to hold the office because he refused to declare his belief in God as required by the Maryland constitution. The U.S. Supreme Court held that the oath violated the U.S. Constitution. Not only was the power and authority of the state put on the side of one particular sort of believers -- those who were willing to say they believe in "the existence of God," but also the freedom of Torasco to believe or not believe as he chose was denied.

2. *Reynolds v. U.S., 98 U.S. 145 (1878).*
A belief of the Mormon church was that it was the duty of the male church members to practice polygamy (the practice of having several wives at one time) and that failure to do so was punishable by eternal damnation. A member of the Mormon Church was prosecuted and convicted under state law for polygamy. He appealed his conviction to the U.S. Supreme Court and the Court held the state law and conviction constitutional.

   The Supreme Court analyzed the history of and reasons for the polygamy laws. Polygamy has always been punishable in the laws of the U.S. It was punishment rooted in the Anglo-Western belief of the importance of marriage and family. Marriage has always been regulated by law because the family is the basis of our society. The Mormons may believe what they want, but the state has a right to interfere with religious practices which threaten the fabric of our society.

3. *Fowler v. Rhode Island, 345 U.S. 67 (1953).*
Members of a Jehovah's Witness sect met in a park in Pawtucket, Rhode Island, for a religious meeting during which Fowler, a Jehovah's Witness minister, delivered a address. After talking a few minutes, he was arrested for violating a city ordinance which said that "no person shall address any political or religious meeting in any public park," but which did not apply to religious services. Fowler was convicted, but the U.S. Supreme Court overturned his conviction because it violated Fowler's right of free exercise of religion and free speech. The Court said:

   > A religious service of Jehovah's Witnesses is treated differently than a religious service of other sects. This amounts to the state preferring some religious groups over this one.... It is no business of courts to say that what is a religious practice or activity for one group is not religion under the First Amendment. Nor is it the competence of courts under our constitutional scheme to approve, disapprove, classify, regulate, or in any way control sermons delivered at religious meetings. Sermons are as much a part of religious services as prayers.

189

4. *State v. Pack*, 527 S.W. 2d 99 (Tenn. 1975).

A church was founded in 1909 at Sale Creek in Grasshopper Valley, Tennessee, approximately 35 miles north of Chattanooga, by George Hensley. Hensley was motivated by a dramatic experience which occurred atop White Oak Mountain on the eastern rim of the valley during which he confronted and seized a rattlesnake which he took back to the valley and admonished the people to "take up or be doomed to eternal hell." Hensley and his followers based their beliefs and practices on Mark 16, verses 17 and 18, which in the Authorized or King James version, reads as follows:

> And these signs shall follow them that believe; in my name shall they cast out devils; and shall speak with new tongues; They shall take up serpents; and if they drink any deadly thing, it shall not hurt them, they shall lay hands on the sick, and they shall recover.

The church Hensley founded spread throughout the south and southeast and continues to exist today. The Holiness Church of God is a part of this movement. Their religious service consists of reading the Bible, singing songs, and when "moved by the spirit" handling deadly snakes and drinking strychnine. After one church member was injured by a poisonous snake and two died from strychnine, the state filed a lawsuit to enjoin (stop) the members of the church from including these practices in their religious services.

The court said that there are two questions which must be asked. One, does application of the statute impose a burden on free exercise of the defendant's religion? Two, if it does, does some compelling state interest justify the infringement? It concluded that even though the law may burden the church's religious beliefs, the state had a compelling reason to do so. The court said that the church members should be forever banned from handling deadly snakes and drinking poisonous liquids as part of their religious ceremonies. The court said that the state "has the right to guard against the unnecessary creation of widows and orphans. Our state and nation have an interest in having a healthy, robust, taxpaying citizenry capable of self-support and of bearing arms and adding to the resources and reserves of manpower.... Yes, the state has a right to protect a person from himself and to demand that he protect his own life."

5. *In re Estate of Brooks*, 32 Ill. 2d 361 (1965).

An adult patient, fully conscious at the time of admission, and without minor children, who had clearly indicated her decision about refusal of a blood transfusion, was allowed to die because of her religious belief.

The Illinois Supreme Court held that the patient could not be compelled to submit to blood transfusions since there were no minor children involved and her refusal presented no clear and present danger to society. The court also stated that the patient was a competent adult who had established her belief that the acceptance of a blood transfusion was in violation of the law of God. The wisdom of her religious belief, which is held by all Jehovah's Witnesses, was not for the court to decide. Therefore, no matter how ridiculous or unwise the beliefs might seem, the court would not permit interference by compelling her to accept the blood transfusion.

6. *Wisconsin v. Yoder*, 406 U.S. 295 (1972).
Jonas Yoder was a member of the Old Order Amish Religion. He and his family were residents of Green County, Wisconsin. Wisconsin's compulsory attendance law required him to cause his children to attend school until they reach age 16, but he refused to send his children to school once they completed the eighth grade.

   The school district filed a complaint and Yoder was convicted of violating the compulsory school attendance law for not sending his 14 and 15 year old children to school.

   The U.S. Supreme Court said that the religious belief of the Amish justified their not obeying the compulsory school attendance law. The Amish genuinely believed that their children's attendance at high school, private or public, was contrary to the Amish religion and way of life. They believed that by sending their children to high school, they would not only expose themselves to the danger of the censure of the church community, but endanger their own salvation and that of their children. Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence. This concept of life aloof from the world and its values is central to their faith. Also, the older children are still educated by persons within the Amish community and engage in a process of learning by doing. Amish beliefs requires their members to make their living by farming or closely related activities. Therefore, working on the farm is the best possible educational experience for these 14 and 15 year olds. Furthermore, the Court said, parents have the primary right to direct the education of their children.

7. *U.S. v. Kuch*, 288 F. Supp. 439 (D.C. 1968).
The defendant was arrested for possession and sale of marijuana and LSD. She claimed to be an ordained minister of the Neo-American Church, which was incorporated in California in 1965 and claims 20,000 members nationwide. LSD and marijuana are the "hosts" or sacraments of the religion. There is a church hierarchy (a structure of officials and organization) and ministers are ordained, but without any formal training.

The court said that what is "lacking...is any solid evidence of a belief in a supreme being, a religious discipline, a ritual, or tenets to guide one's daily existence." This group has only a desire to use drugs, regardless of any religious experience. Even assuming that this is a genuine religion, the adherents are still not entitled to take drugs in the name of religion because of the compelling state interest of protecting society through its criminal laws. The adherents may hold their beliefs, but may not practice them if they endanger society and violate laws for society's protection, health, safety, and order.

8. *Employment Division, Department of Human Resources of Oregon v. Smith, 110 S.Ct. 1595 (1990).*
Alfred Smith and Galen Black were punished by the state because they used peyote for sacramental purposes at a ceremony of the Native American Church, to which both of them belonged. The use of peyote is illegal under Oregon law. Peyote appears as small "buttons" on the tops of certain cactus plants found in the Rio Grande Valley of Texas and northern Mexico. When eaten, peyote produces several types of hallucinations, depending on the user. Peyotism, the taking of peyote as part of a religious ritual, was observed among Indians by Spanish explorers in Mexico in the sixteenth century, and became an established practice among American and Canadian Indian tribes before 1890.

The justices agreed that Oregon's criminal prohibition of peyote places a sincere burden on the ability of members of the Native American Church to freely exercise their religion. They disagreed, however, on whether the state had a compelling enough reason to prohibit them from acting on those beliefs. Some justices reasoned that the nation's interest in controlling drug abuse, "one of the greatest problems affecting the health and welfare of our population," was a compelling enough reason. Other justices concluded that there was no evidence that the limited *religious* use of peyote was harmful. They explained that the Native American Church uses peyote as part of a carefully controlled and supervised religious ritual.

The majority of the Court, however, said that this question was not important. The Court said that a neutral law that is not directed at regulating religious belief or behavior, but which applies generally (such as a law prohibiting the use of certain drugs), does not interfere with the free exercise of religion just because obeying the law will force one to do things his or her religion prohibits or prevent one from doing something his or her religion requires. In other words, while government cannot say that no one can worship the sun because such a law would be directly aimed at purely religious conduct, it can say for reasons that have nothing to do with religion that no one in the army can wear a hat indoors while in uniform, even though some soldiers' religion require them to wear hats.

We the People

THE BILL OF RIGHTS:

A Law-Related Curriculum for High School Students

Lesson 6:
The Right to Keep and Bear Arms

Written by

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A project of
The Bill of Rights in Nebraska

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Funding for this project is provided by a grant from the Nebraska Committee for the Humanities, an affiliate of the National Endowment for the Humanities and grants from the Cooper Foundation, the Walter Scott Jr. Foundation, the Robert Veach Foundation, and the Winthrop and Frances Lane Foundation.

We the People

TABLE OF CONTENTS

Introduction

Lesson 6: The Right to Keep and Bear Arms 6

Teaching Instructions

Activity 6A: The Need to Bear Arms: An Historical Perspective 9

Activity 6B: Amendment Two - Two Interpretations 11

Activity 6C: Gun Control: A Legislative Debate 12

Student Materials

Activity 6A: The Need to Bear Arms: An Historical Perspective 15

Activity 6C: Gun Control: A Legislative Debate 16

BILL OF RIGHTS

CURRICULUM EVALUATION

HIGH SCHOOL

Teacher ____________________

School ____________________

Grade ____________________

Lesson taught ____________________

A. Please rate your degree of agreement/disagreement with the following statements:

	Totally Agree			**Totally Agree**	
1) The lesson was well suited to my students' conceptual level.	1	2	3	4	5
2) The lesson provided new information.	1	2	3	4	5
3) The lesson presented concepts and information in a better manner than do traditional texts.	1	2	3	4	5
4) The lesson meshed well with our course outline for the semester	1	2	3	4	5
5) I personally learned something from the lesson.	1	2	3	4	5
6) The materials were complete enough for good presentation.	1	2	3	4	5
7) I feel the lesson will be thought provoking for students (stimulate out of class thought & discussion).	1	2	3	4	5
8) I can pick up on the lesson in subsequent classes.	1	2	3	4	5
9) I think the lesson challenged some students' attitudes.	1	2	3	4	5
10) The lesson incorporated, built upon material we have already covered.	1	2	3	4	5
11) I was able to use the lesson *as is*.	1	2	3	4	5
12) I *adapted* the lesson in my presentation.	1	2	3	4	5
13) I would consider using more such materials in my classes.	1	2	3	4	5
14) I feel the materials are deficient in some way.	1	2	3	4	5

Please respond to the questions on the next page also.

Mail completed form to:
Alan Frank, University of Nebraska, College of Law, Lincoln, NE 68583-0902

B. Please answer the following:

1) Describe students' reaction/participation to this lesson:

2) What do you consider the best point of this lesson/activity?

3) What suggestions do you have for adapting or modifying this lesson/activity?

4) Were the materials adequate? How could they be improved?

Lesson 6
THE RIGHT TO KEEP AND BEAR ARMS

We the People

INTRODUCTION

A well-regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

- 2nd Amendment, U.S. Constitution

While the Second Amendment has produced much less litigation than the First, it is not without controversy. The emergence of gun control as a proposed method of combatting crime and the recent unsuccessful petition drive to amend the Nebraska Constitution by adding a provision guaranteeing the right to possess firearms illustrate the current debate surrounding the Second Amendment. It is not entirely clear whether the Second Amendment applies only to the federal government or whether it has been incorporated by the Fourteenth Amendment's due process clause and applies also to state and local governments, nor is it clear whether individual gun owners are protected from mgovernment infringement or whether the amendment only protects the states' right to maintain organized militia. The strong weight of current judicial opinion is that the Second Amendment merely protects a state's right to have a militia free from federal interference. For conflicting historical interpretations of the Second Amendment see "A Parley: The Founding Fathers and the Right to Bear Arms," *this Constitution: A Bicentennial Chronicle*, Spring 1987, published by Project '87 of the American HistoricalAssociation and American Political Science Association.

GOAL

To understand the meaning of the Second Amendment as interpreted by decisions of the United States Supreme Court.

OBJECTIVES

As a result of this lesson, students will be able to:

1. Describe the historical basis of the Second Amendment and decide on its relevance to society today *(Activity 6-A)*.
2. Describe the two conflicting interpretations of the Second Amendment *(Activity 6-B)*.
3. Examine major U.S. Supreme Court decisions concerning the right to keep and bear arms and apply the precedents to hypothetical gun-control legislation *(Activity 6-C)*.
4. Debate the merits of gun-control legislation *(Activity 6-C)*.

ACTIVITIES

		Teaching Instructions	Student Materials
Activity 6A.	The Need to Bear Arms: An Historical Perspective	9	15
Activity 6B.	Amendment Two--Two Interpretations	11	?
Activity 6C.	Gun Control: A Legislative Debate	12	16

We the People

TEACHING
INSTRUCTIONS

Activity 6-A:

The Need to Bear Arms:
An Historical Perspective

Purpose: To acquaint students with some of the historical reasons why the right to keep and bear arms was important to the authors of the Bill of Rights and to encourage students to consider whether this right is important today.

Student Materials: "The Need to Bear Arms: An Historical Perspective" questions, p. 12.

Directions: Instruct the students to read the directions and answer the questions. Some possible answers include:

1. Persons with firearms included:
   - some colonists, frontiersmen, trappers, and other pioneers
   - colonial militia
   - British soldiers
   - Continental Army soldiers
   - Native Americans (Indians)

2. Reasons that might be given for the need to use firearms in 1776 include:
   - by hunters for food and clothing
   - by farmers (pioneers) to protect their livestock from wild animals
   - by colonial militia for defense of the colony from foreign forces (e.g., the French and Indian War) and from internal rebellion
   - by British troops to maintain order in the thirteen colonies
   - by the soldiers of the Continental Army to combat the British soldiers in the War for Independence (the Revolutionary War)
   - by Indians to defend their land from those who were trying to take it away

3. People with firearms today include:
   - the military
   - the National Guard
   - the police
   - criminals
   - hunters
   - target shooters
   - gun collectors
   - other citizens concerned about protecting their property and their personal safety and that of their families

4. Reasons that might be given for the need to use firearms today include:
   - by the military and National Guard for defense of the country
   - by the police to prevent crime and apprehend criminals
   - by criminals in the commission of crimes
   - by hunters, target-shooters, and gun collectors for recreation
   - by other citizens for protection

5. One point of view is that individual gun ownership is not as important today as it was in 1776. Others believe that gun ownership is stilL very important today. Some of the possible arguments are listed in the chart below:

Not Important	Important
We are not dependent on citizen-owned firearms for food. The recreation provided by activities hunting, target shooting, etc. is fine, but this is a lower level of need than existed in 1776.	-Hunting and target shooting are important outdoor that teach, among other things, personal safety and how to protect oneself.
-Public safety is best protected by well-trained, well-equipped police. This was not so true in the past when law enforcement was not as professional as it is today and it was difficult even to contact neighbors for help.	-Increases in police budgets and personnel have not prevented major increases in the per capita incidence of reported rapes, robberies, and aggravated assaults.
-The public will be safer if we keep guns out of the hands of criminals.	-Those intent on criminal activity will always obtain the weapons they need.
-Guns are dangerous. A handgun owned by a householder is six times as likely to accidentally kill a relative or acquaintance of the homeowner as to kill a burglar.	-Statistics that purport to show that guns in the home are dangerous are not accurate and do not measure the deterrent effect of civilian gun ownership. The way to prevent accidental death is not to ban guns, but to teach safety. We continue to manufacture, sell, and use dangerous household chemicals.
-Guns in the hands of private citizens do not add to the national defense. Armed civilians would stand no chance against a modern military machine. Despite the fears of the founding fathers we do have a full-time standing army.	-The success of guerrilla tactics in Vietnam and elsewhere show the value of an armed citizenry. Guns in private hands may effectively deter a military coup.

It is important to point out that even if it were clear that gunownership is not important today that would in no way settle thedispute. Even if everyone were to agree that private gunownership is of little value today and that the Second Amendmentis obsolete, the fact remains that the Amendment is part of theConstitution and must be applied and enforced unless repealed. The utility of gun ownership, however, may bear on the properinterpretation of the Amendment.

We the People

Activity 6B:

Amendment Two — Two Interpretations

Purpose: To acquaint students with the controversy over whether the Second Amendment guarantees individuals the right to keep and bear arms or protects only the states' right to maintain organized military units.

Student Materials: The Second Amendment in "The Extended Bill of Rights" from Activity 1- .

Directions:
1. Direct the students to read the Second Amendment in their Extended Bill of Rights or write it on the chalkboard.

2. Tell the students that there are two ways the Amendment has been interpreted: one consistent with the notion that an individual has a constitutionally protected right to possess firearms and another inconsistent with that notion. Ask the students what they think these two interpretations are.

It is hoped that the students will recognize that one interpretation would emphasize the opening clause — "A well-regulated Militia, being necessary to the security of a free state, . . ." The argument is that the amendment protects only a state's right to maintain organized military units, a right thought necessary by those who feared that Congress might order the states' organized militia disarmed,thereby leaving the states powerless against federal tyranny. Under this interpretation there is no constitutionally protected right of individual citizens to keep and bear arms.

The second interpretation emphasizes the second clause ofthe amendment — "the right of the people to keep and bear arms, shall not be infringed." The argument for this interpretation is that the amendment declares that the right is that of the *people* and that the first clause only states one of the reasons for that right. This interpretation would guarantee to individuals a right to possess guns. Even under this interpretation that right would undoubtedly not be an absolute one, just as First Amendment rights are not absolute.

Activity 6-C:

Gun Control: A Legislative Debate

Purpose: To provide students with an opportunity to debate the constitutionality and wisdom of gun-control legislation.

Student Materials: "L.B. 1791 - A Bill Regulating the Possession of Firearms and Other Dangerous Weapons," pp. 13-16; L.B. 1791 A (a simplified version of L.B. 1791), p. 17; "The Precedents," pp. 18-21; and other teacher-provided materials.

Directions: In this activity the students engage in a mock legislative debate before the Unicameral's Judiciary Committee on a bill that would outlaw the possession of handguns and other dangerous weapons in the State of Nebraska. Two versions of the bill are included in the student materials. For teachers who wish their students to work with material that realistically conveys the complexity of actual legislation, L.B. 1791 — modeled after the ordinance passed by the Village of Morton Grove, Illinois — is provided. For teachers who prefer to have their students work with less complicated material, L.B. 1791 A — an abbreviated version of L.B. 1791 — is provided.

1. Assign the students to read the version of the proposed bill you select and review its important features with them.

2. Divide the students into three groups — proponents of the bill, opponents of the bill, and members of the judiciary committee. If the class is large and facilities permit, you might want to organize the class into six groups and have two hearings.

3. Provide adequate time for the groups to prepare for the debate. Each group should read the material titled "The Precedents" and other material on gun control. An excellent resource is the "Weapons in America" issue of *Editorial Forum*, published by GEM Productions, Inc. Copies can be obtained from the Nebraska State Bar Association. Your school library may also have a vertical file on the subject.

4. If possible, persons knowledgeable about the issue should be invited in to work with each group. Your state senator, a former senator, a local person who has testified before a legislative committee, or someone else familiar with procedures before a legislative committee would be a good person to advise the legislative group.

5. The proponents and opponents should each select four or five students to testify before the committee. One of the proponents should be the senator introducing the bill who should summarize the bill and explain why he or she believes it should be passed. One of the proponents and one of the opponents should present arguments on the constitutionality of the bill.

Arguments which support the bill's constitutionality: The proponent can argue that the precedents strongly support the bill's constitutionality. *Presser v. Illinois* held that the Second Amendment only restricts the federal government, not the states, and *Presser* and *United States v. Miller* support the position that the amendment only protects a state's right to maintain an organized militia and in no way guarantees to an individual the right to keep and bear arms. To the argument that *Presser* is outdated and that the Supreme Court today could well find that the right to keep and bear arms is a fundamental right with which the states cannot interfere under the Fourteenth Amendment, the proponent can argue that the Court has never said so, even though it could have chosen to hear a case on this subject had it wanted to. The Court's last word on the subject is that the Second Amendment does not apply to the states. That is the law of the land and must be followed until and unless the Court overrules it.

Arguments which support the bill's unconstitutionality: The opponent can argue that *Presser v. Illinois* is outdated and that the Supreme Court today would probably rule that the right to keep and bear arms is a fundamental right which applies to the states through the Fourteenth Amendment. He or she can point to the Madison quote as an indication of the importance the founding fathers attached to this right. The opponent can also argue that although *Presser* and *Miller* connect the Second Amendment to the militia, they both say that the militia was historically composed of all citizens capable of bearing arms and that each was expected to supply his own weapon. Thus the amendment protects the right of *individuals* to possess firearms. *Miller* only decided that sawed-off shotguns were not the type of weapons the amendment protected.

Note:

In *Quilici v. Village of Morton Grove*, 695 F.2d 261 (1982), the Seventh Circuit Court of Appeals upheld the constitutionality of the Morton Grove gun control ordinance.

It held that the Second Amendment did not apply to the states and that the language of the amendment "seems clear that the right to bear arms is inextricably connected to the preservation of a militia." This is in accord with the vast majority of courts that have considered this issue in recent years.

6. The other students testifying should play the roles of people knowledgeable or experienced in the area — for example, a scholar familiar with various statistical studies, a homeowner who protected his family from a dangerous intruder with a hand gun, a mother whose six year old son was accidentally killed when he came across the family's "unloaded" pistol.

7. The committee members should be prepared to conduct the hearing and intelligently question those testifying.

8. Give each side an equal amount of time to present its witnesses.

9. When the hearing is completed the judiciary committee should decide whether to kill the bill or send it on to the floor.

Alternative Activity:

Instead of debating the gun control law, the students can debate the following proposed amendment to the Nebraska Constitution. (An initiative petition campaign to put the proposed amendment on the ballot failed in July, 1986).

Constitution of Nebraska, Article 1, Section 1, be amended and reenacted as follows:

> All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty, and the pursuit of happiness, and the right to keep or bear arms for security or defense of self, family, home, others, and the state, and for lawful hunting, recreational use, and all other lawful purposes and such rights shall not be infringed by the state or any subdivision thereof and no law shall impose licensing, registration or special taxation on firearms or ammunition. To secure these rights, and the protection of property, governments are instituted among people, deriving their just powers from the consent of the governed.

BEST COPY AVAILABLE

We the People

STUDENT MATERIALS

Activity 6-A

The Need to Bear Arms: An Historical Perspective

Imagine that the year is 1776. You are living in one of the original thirteen colonies. Based upon your knowledge of that time and of our time answer the following questions:

1. What persons or groups of persons generally had firearms in 1776?

2. What were the reasons why these persons or groups needed firearms?

3. What persons or groups generally have firearms today?

4. Why might these persons or groups need firearms?

5. Is the right to own and use firearms as important today as it was in 1776? Why or why not?

Activity 6-C

Gun Control: A Legislative Debate

L.B. 1791

A BILL REGULATING THE POSSESSION OF FIREARMS AND OTHER DANGEROUS WEAPONS

WHEREAS, it has been determined that in order to promote and protect the health and safety and welfare of the public it is necessary to regulate the possession of firearms and other dangerous weapons, and

WHEREAS, the Legislature of the State of Nebraska has determined that the easy and convenient availability of certain types of firearms and weapons has increased the potentiality of firearm related deaths and injuries, and

WHEREAS, handguns play a major role in the commission of homicide, aggravated assault, and armed robbery, and accidental injury and death.

Be it enacted by the people of the State of Nebraska,

Weapons Control

Section 1. Definitions

(A) **Firearm:** "Firearm" means any device, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas; excluding however;

(1) Any pneumatic gun, spring gun or B-B gun which expels a single globular projectile not exceeding .18 inches in diameter.

(2) Any device used exclusively for signalling or safety and required or recommended by the United States Coast Guard or the Interstate Commerce Commission.

(3) Any device used exclusively for the firing of stud cartridges, explosive rivets or similar industrial ammunition.

(4) An antique firearm (other than a machine gun) which, although designed as a weapon, the State Patrol of the State of Nebraska finds by reason of the date of its manufacture, value, design and other characteristics is primarily a collector's item and is not likely to be used as a weapon.

(5) Model rockets designed to propel a model vehicle in a vertical direction.

(B) **Handgun:** Any firearm which (1) is designed or redesigned or made or remade, and intended to be fired while held in one hand or (2) having a barrel of less than 10 inches in length or (3) a firearm of a size which may be concealed upon the person.

(C) **Person:** Any individual, corporation, company, association, firm, partnership, club, society or joint stock company.

(D) **Handgun Dealer**: Any person engaged in the business of (1) selling or renting handguns at wholesale or retail (2) manufacture of handguns (3) repairing handguns or making or fitting special barrels or trigger mechanisms to handguns.

(E) **Licensed Firearm Collector**: Any person licensed as a collector by the Secretary of the Treasury of the United States under and by virtue of Title 18, United States Code, Section 923.

(F) **Licensed Gun Club:** A club or organization, organized for the purpose of practicing shooting at targets, licensed by the State of Nebraska.

Section 2. Possession:

No person shall possess in the State of Nebraska the following:

(A) Any bludgeon, black-jack, slug shot, sand club, metal knuckles or any knife, commonly referred to as a switchblade knife, which has a blade that opens automatically by hand pressure applied to a button, spring, or other device in the handle of the knife; or

(B) Any weapon from which 8 or more shots or bullets may be discharged by a single function of the firing device, any shotgun having one or more barrels less than 18 inches in length, sometimes called a sawed off shotgun or any weapon made from a shotgun, whether by alteration, modification or otherwise, if such weapon, as modified or altered has an overall length of more than 26 inches, or a barrel length of less than 18 inches or any bomb, bomb-shell, grenade, bottle or other container containing an explosive substance of over one-quarter ounce for like purposes, such as, but not limited to black powder bombs and Molotov cocktails or artillery projectiles; or

(C) Any handgun, unless the same has been rendered permanently inoperative.

Section 3. Subsection 2(A) shall not apply to or affect any peace officer.

Section 4. Subsection 2(B) shall not apply to or affect the following:
(A) Peace officers;

(B) Wardens, superintendents and keepers of prisons, penitentiaries, jails and other institutions for the detention of persons accused or convicted of an offense;

(C) Members of the Armed Services or Reserve Forces of the United States or the Nebraska National Guard, while in the performance of their official duties; and

(D) Transportation of machine guns to those persons authorized under Subparagraphs (A) and (B) of this subsection to possess machine guns, if the machine guns are broken down in a non-functioning state or not immediately accessible.

Section 5. Subsection 2(C) does not apply to or affect the following:

(A) Peace officers or any person summoned by any peace officer to assist in making arrests or preserving the peace while he or she is actually engaged in assisting such officer and if such handgun was provided by the peace officer;

(B) Wardens, superintendents and keeper of prisons, penitentiaries, jails and other institutions for the detention of persons accused or convicted of an offense;

(C) Members of the Armed Services or Reserve Forces of the United States or the Nebraska National Guard or the Reserve Officers Training Corps, while in the performance of their official duties;

(D) Special Agents employed by a railroad or a public utility to perform police functions; guards of armored car companies; watchmen and security guards actually and regularly employed in the commercial or industrial operation for the protection of persons employed and private property related to such commercial or industrial operation;

(E) Licensed gun collectors;

(F) Licensed gun clubs provided the gun club has premises from which it operates and maintains possession and control of handguns used by its members, and has procedures and facilities for keeping such handguns in a safe place, under the control of the club's chief officer, at all times when they are not being used for target shooting or other sporting or recreational purposes at the premises of the gun club; and gun club members while such members are using their handguns at the gun club premises;

(G) A possession of an antique firearm;

(H) Transportation of handguns to those persons authorized under Subparagraph A through G of this subsection to possess handguns, if the handguns are broken down in a non-functioning state or not immediately accessible;

(I) Transportation of handguns by persons from a licensed gun club to another licensed gun club or transportation from a licensed gun club to a gun club outside the state; provided however that the transportation is for the purpose of engaging in competitive target shooting or for the purpose of permanently keeping said handgun at such new gun club, and provided further that at all times during such transportation said handgun shall have trigger locks securely fastened to the handgun.

Section 6: Penalty:

(A) Any person violating Section 2(A) or 2(B) of this Act shall be guilty of a misdemeanor and shall be fined not less than $100.00 nor more than $500.00 or incarcerated for up to six months for each such offense.

(B) Any person violating Section 2(C) of this Act shall be guilty of a petty offense and shall be fined no less than $50.00 nor more than $500.00 for such offense. Any person violating Section 2(C) of this Act more than one time shall be guilty of a misdemeanor and shall be fined no less than $100.00 nor more than $500.00 or incarcerated for up to six months for each such offense.

(C) Upon conviction of a violation of Section 2(A) through 2(C) of this Act, any weapon seized shall be confiscated by the trial court and when no longer needed for evidentiary purposes, the court may transfer such weapon to the State Patrol which shall destroy it.

Activity 6-C

Gun Control: A Legislative Debate

L.B. 1791 A

A BILL REGULATING THE POSSESSION OF FIREARMS AND OTHER DANGEROUS WEAPONS

Section 1. No persons shall possess in the State of Nebraska any switchblade knife, sawed-off shotgun, or handgun — a firearm which is intended to be fired while held in one hand or which may be concealed upon the person — that has not been rendered permanently inoperative.

Section 2. Section 1 shall not apply to peace officers, jailors, members of the Armed Services or Reserve Forces of the United States or the Nebraska National Guard while in the performance of their official duties, and licensed gun clubs possessing handguns only for the purpose of target shooting.

Section 3. Any person violating Section 1 of this Act shall be fined no less than $50.00 nor more than $500.00 for such offense. Any person violating Section 1 of this Act more than one time shall be fined no less than $100.00 nor more than $500.00 or incarcerated for up to six months for each such offense.

Activity 6-C

Gun Control: A Legislative Debate:

The Precedents

When there is a dispute as to the meaning of any provision of the Constitution or as to how that provision applies in a particular instance, it is left to the courts to make the final decision. They do this by deciding individual cases. The final decision-maker is, of course, the U.S. Supreme Court. The interpretation of a constitutional provision by the Supreme Court establishes what is known as precedent.

A precedent is a rule of law established by a court in a particular case and thereafter referred to in deciding similar cases. Precedents are a major source of information for judges as they make decisions on cases involving similar questions.

Therefore, when judges are asked to hear cases involving the Second Amendment, they must examine the precedents and determine which precedents best apply in a particular case. Likewise when a legislative body is considering a law which might infringe on the right to keep and bear arms, the legislators will examine the precedents to determine whether it is likely that the law can survive a constitutional challenge.

Below are summaries of two important U.S. Supreme Court precedents interpreting the Second Amendment and some comments.

1.***Presser v. Illinois*, 116 U.S. 252 (1886)**

Presser was a citizen of Illinois. He was in charge of a paramilitary organization, a sort of private army. In 1879 he paraded his private army, carrying rifles, down the streets of Chicago. Presser was arrested for parading with firearms without a license and for violating an Illinois statute that prohibited the formation of military associations outside of the National Guard. Presser was convicted, but he appealed, claiming his conviction violated the Second Amendment's protection of "the right of the people to keep and bear arms."

The Court upheld Presser's conviction. It ruled that the Second Amendment applies only to the *federal government*. It prevents the *federal government* from violating the right to keep and bear arms. It in no way limits the power of state or local governments. The Court went on to say that all citizens capable of bearing arms are part of the reserve military forces of the United States and of the individual states and that therefore, even disregarding the Second Amendment, a state could not prohibit people from keeping and bearing arms so as to deprive the United States of this resource for maintaining the public security. However, it held the laws in question here did not have that effect.

2.***United States v. Miller*, 307 U.S. 174 (1939)**

During the decade of prohibition, with its gang wars, and the subsequent depression years of John Dillinger and Bonnie and Clyde, sawed-off shotguns and submachine guns had become widely identified in the public mind as gangster weapons. The National Firearms Act of 1934 outlawed the possession of these weapons. Two men, Miller and Layton, were accused of violating the act. They claimed the act violated the Second Amendment. The Court held that it did not, stating: In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" has some reasonable relationship to the preservation of efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.

The Court pointed out that the Constitution granted Congress power to call forth the militia and that the Second Amendment was adopted for the purpose of assuring that the federal government would not abolish this ready reserve and rely instead on a standing army. It pointed out that historically the militia was comprised of "all males physically capable of acting in concert for the national defense." Each adult male was obligated to possess arms and ammunition which he would use for militia duty when necessary.

3. Comments

As you consider these cases think about the following points.

1. The Court in *Presser* also held that the First Amendment provision, "Congress shall make no law . . . abridging the right of the people peaceably to assemble," applied only to Congress and not to the states. Subsequently, as was discussed in Lesson 1, the Court has decided that the due process clause of the Fourteenth Amendment provides that the states may not infringe upon those provisions of the Bill of Rights that are considered fundamental to the American system of law. In 1937 the Court decided that freedom of assembly was one of those rights. The Supreme Court has not said that the right to keep and bear arms is one of those rights, but neither has it said that it is not. In recent years the court has had a number of opportunities to hear cases involving state regulation of guns, but has declined to do so.

2. The Supreme Court has often said that its refusal to hear a case when the losing party in the lower court asks it to, is not to be read as saying anything one way or the other on the merits of the issues presented. Still there is reason to believe that the Justices' views on the merits of a case play a role in the decision on whether to hear a case.

3. James Madison has been quoted as saying

> A government resting on a minority is an aristocracy, not a Republic, and could not be safe with a numerical and physical force against it, without a standing army, an enslaved press, and a disarmed populace.

> *have paid at least the amount for which liability was undisputed, and that a penalty is therefore warranted.*

(Emphasis supplied.)

In *Holton v. F.H. Stoltze Land Lbr. Co.*, 195 Mont. 263, 637 P.2d 10 (1981), the court held that although the total amount of compensation may be in dispute, the employer's insurer has a duty to promptly pay any undisputed compensation, and that the only legitimate excuse for delay of compensation is the existence of genuine doubt from a medical or legal standpoint that any liability exists. See, also, *Berry v. Workmen's Comp. App. Bd.*, 276 Cal. App. 2d 381, 81 Cal. Rptr. 65 (1969); *Lethermon v. American Insurance Company*, 129 So. 2d 507 (La. App. 1961); *Dufrene v. St. Charles Parish Police Jury*, 371 So. 2d 378 (La. App. 1979); *Bradley v. Mercer*, 563 P.2d 880 (Alaska 1977).

In this case, the defendant's insurance carrier wrote to the plaintiff on March 1, 1988, offering a lump-sum settlement based on Dr. Urban's estimate of 22 percent disability to the body as a whole. The offer, however, failed to take into account that compensation for permanent partial disability to the body as a whole is compensated on the basis of loss of earning capacity and employability rather than functional or medical loss. Neb. Rev. Stat. § 48-121(1) and (2) (Reissue 1988). There is substantial evidence that if the plaintiff's permanent disability is to her body as a whole, as opposed to a schedule injury, her disability is in excess of 22 percent.

But instead of paying compensation to the plaintiff for some amount of permanent partial disability, the defendant has paid no compensation to the plaintiff since February 29, 1988. Under these circumstances, the plaintiff is entitled to attorney fees; the 50-percent penalty for waiting time; and interest on all payments which have accrued, until the date they are paid.

The judgment of the compensation court is reversed and the cause remanded for further proceedings in conformity with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLANT, v. CHARLES A. COMEAU, APPELLEE.
STATE OF NEBRASKA, APPELLANT, v. LARRY L. RUSH, APPELLEE.

_____N.W.2d_____

Filed December 1, 1989. Nos. 89-186, 89-187.

1. **Constitutional Law: Statutes: Presumptions: Proof.** A statute is presumed to be constitutional, and the burden of establishing unconstitutionality is on the party attacking its validity.
2. **Constitutional Law: Statutes: Proof.** Unconstitutionality must be clearly established before a statute will be declared void.
3. **Constitutional Law: States: Statutes.** The police power is an attribute of state sovereignty, and, within the limitations of state and federal Constitutions, the state may, in its exercise, enact laws for the promotion of public safety, health, morals, and generally for the public welfare.
4. **Constitutional Law.** The constitutional right to keep and bear arms is not absolute.
5. **Constitutional Law: Statutes.** The constitutional right to keep and bear arms is subject to reasonable regulation by statute if the statute does not frustrate the guarantee of the constitutional provision.
6. _____: _____. Neb. Rev. Stat. § 28-1206 (Reissue 1985) is held not to be invalid as in conflict with article I, § 1, of the Constitution of Nebraska.
7. _____: _____. Neb. Rev. Stat. § 28-1207 (Reissue 1985) is held not to be invalid as in conflict with article I, § 1, of the Constitution of Nebraska.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY and DONALD E. ROWLANDS II, Judges. Exceptions sustained, and causes remanded for further proceedings.

Robert M. Spire, Attorney General, and William L. Howland, and Kent D. Turnbull, Lincoln County Attorney, and John H. Marsh for appellant.

Kent E. Florom, Lincoln County Public Defender, for appellees.

Robert I. Eberly and Robert Dowlut for amici curiae National Rifle Association of America and Nebraska Rifle and Pistol Association.

Jerry Soucie for amicus curiae Nebraska Criminal Defense Attorneys Association.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

Boslaugh, J.

These cases involve an interpretation and application of the "Right to Bear Arms" amendment to the Nebraska Constitution, which was proposed by the initiative process and adopted at the general election on November 8, 1988. Article I, § 1, of the Constitution of Nebraska, as amended, now provides as follows:

> All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty, the pursuit of happiness, and the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof. To secure these rights, and the protection of property, governments are instituted among people, deriving their just powers from the consent of the governed.

In case No. 89-186, the defendant, Charles A. Comeau, was charged with possessing a firearm from which the manufacturer's identification marks or serial numbers had been removed, defaced, altered, or destroyed. The defendant filed a "demurrer" which alleged that the information failed to state a crime because Neb. Rev. Stat. § 28-1207 (Reissue 1985), under which the defendant was being prosecuted, was now unconstitutional. Treating the demurrer as a motion to dismiss, the trial court sustained it and dismissed the information.

In case No. 89-187, the defendant, Larry L. Rush, was charged, as a habitual criminal, with being a felon in possession of a firearm having a barrel less than 18 inches in length. The defendant filed a "demurrer" which alleged that the information failed to state a crime because Neb. Rev. Stat. § 28-1206 (Reissue 1985), under which the defendant was being prosecuted, was now unconstitutional. Treating the demurrer as a motion to dismiss, the trial court sustained it and dismissed the information.

The State then commenced proceedings under Neb. Rev. Stat. § 29-2315.01 (Reissue 1985) to review [illegible] orders dismissing the informations. In this court the cases have been consolidated for briefing and argument.

It is fundamental that a statute is presumed to be constitutional, and the burden of establishing unconstitutionality is on the party attacking its validity. *In re Guardianship and Conservatorship of Sim*, 225 Neb. 181, 403 N.W.2d 721 (1987). Unconstitutionality must be clearly established before a statute will be declared void. *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987).

Essentially, the question presented by these appeals is whether the amendment prevents the Legislature from passing any laws regulating the possession of firearms.

The defendants contend that the amendment must be read literally and that the language which states that the right to keep and bear arms is "inalienable" and shall not be "infringed" by state statute or local ordinance prevents any regulation by the Legislature of the right to possess arms. The defendants concede that the use of weapons may be regulated, but argue that mere possession may not be.

The State contends that the plain meaning of the amendment is that the right to keep and bear arms is limited to "lawful purposes." Lawful purposes are not defined in the amendment except as "for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes . . . ." The State argues that in the exercise of the police power, the Legislature may define what purposes are lawful purposes.

The police power is an attribute of state sovereignty, and, within the limitations of state and federal Constitutions, the state may, in its exercise, enact laws for the promotion of public safety, health, morals, and generally for the public welfare. *Finocchiaro, Inc. v. Nebraska Liq. Cont. Comm.*, 217 Neb. 487, 351 N.W.2d 701 (1984).

There are very few rights which are absolute, and this is of necessity. In every phase of everyday experience, there are extremes beyond which some restraint or regulation is necessary for the common good.

Even in those cases where statutes have been held to be invalid because in conflict with a constitutional provision concerning the right to keep and bear arms, many [illegible] have

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recognized that the right is not absolute. In *City of Princeton v. Buckner*, 377 S.E.2d 139 (W. Va. 1988), in which the Supreme Court of Appeals of West Virginia held a statute requiring a license to carry certain weapons invalid, the court said:

> The question remains whether the State may reasonably regulate the right of a person to keep and bear arms in this State.
>
> We stress that our holding above in no way means that the right of a person to bear arms is absolute. *See* cases cited *infra* at p. 146. Other jurisdictions concluding that state statutes or municipal ordinances have violated constitutional provisions guaranteeing a right to bear arms for defensive purposes, though not specific in what ways this is to be done, have recognized that a government may regulate the exercise of the right, provided the regulations or restrictions do not frustrate the guarantees of the constitutional provision. *See, e.g., In Re Brickey*, 8 Idaho 597, 599, 70 P. 609, 609 (1902); *City of Las Vegas v. Moberg*, 82 N.M. 626, 627, 485 P.2d 737, 738 (Ct.App.1971). Particularly, on three occasions, the Supreme Court of Oregon, in striking statutes as violative of the state's constitutional right to bear arms, has repeatedly stressed that the court's holdings should not be construed to mean that an individual has an "unfettered right" to *possess* or use constitutionally protected arms in any way he chooses. The Oregon court has consistently emphasized that the legislature may regulate such *possession* and use. *State v. Delgado*, 298 Or. at 403, 692 P.2d at 614; *State v. Blocker*, 291 Or. at 259, 630 P.2d at 826; *State v. Kessler*, 289 Or. at 370; 614 P.2d at 99.
>
> ....
>
> Our research has revealed that courts throughout the country have recognized that the constitutional right to keep and bear arms is not absolute, and these courts have uniformly upheld the police power of the state through its legislature to impose reasonable regulatory control over the state constitutional right to bear arms in order to promote the safety and welfare of its citizens. *See, e.g., Bristow v. State*, 418 So.2d 927, 930 (Ala.Crim.App.), *cert. denied* (Ala.1982); *People v. Blue*, 190 Colo. 95, 102-03, 544 P.2d 385, 390-91 (1975); *State v. Rupp*, 282 N.W.2d 125, 130 (Iowa 1979); *In re Atkinson*, 291 N.W.2d 396, 399 (Minn.1980); *State v. Angelo*, 3 N.J.Misc. 1014, 1015, 130 A. 458, 459 (1925); *State v. Dees*, 100 N.M. 252, 254-55, 669 P.2d 261, 263-64 (Ct.App.1983); *Commonwealth v. Ray*, 218 Pa.Super. 72, 79, 272 A.2d 275, 279 (1970); *Carfield v. State*, 649 P.2d 865, 871 (Wyo.1982). We stress, however, that the legitimate governmental purpose in regulating the right to bear arms cannot be pursued by means that broadly stifle the exercise of this right where the governmental purpose can be more narrowly achieved. *City of Lakewood, supra*.

At least forty-two jurisdictions have constitutional provisions guaranteeing a right to bear arms; however, most are distinguishable from art. III, § 22 either in their failure to specifically recognize the right to self-defense, or in their express recognition that the constitutional provision is subject to legislative regulation. *See* R. Dowlut & J. Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 Okla. City U.L.Rev. 177, 236-240 (1982). The State, in the appendix to its brief, cites thirteen states which, like art. III, § 22, grant a rather broad, unrestrictive right to bear arms for the defense of self and the state. With the exception of Vermont, which imposes no significant regulation, the remaining jurisdictions regulate the ownership and use of arms in general, particularly handguns.

Again excluding Vermont, certain statutory regulations are common to most of the jurisdictions having constitutional provisions comparable to West Virginia's. For instance, *the prohibition against the possession or ownership of handguns by persons previously convicted of a felony or other specified crime is widely accepted.* Four states prohibit the open or concealed carrying of handguns without a license or permit; several others specifically prohibit carrying a concealed handgun without a license, while at least one of these jurisdictions, namely, Arizona, further prohibits carrying a handgun in public establishments or certain specified public places.

> Based upon the foregoing, we conclude that the right to keep and bear arms guaranteed by *W. Va. Const.* art. III, § 22 is not unlimited. The individual's right to keep and bear arms and the State's duty, under it [sic] police power, to make reasonable regulations for the purpose of protecting the health, safety and welfare of its citizens must be balanced. *See People v. Blue*, 190 Colo. 95, 102-03, 544 P.2d 385, 390-91 (1975). Accordingly, the West Virginia legislature may, through the valid exercise of its police power, reasonably regulate the right of a person to keep and bear arms in order to promote the health, safety and welfare of all citizens of this State, provided that the restrictions or regulations imposed do not frustrate the constitutional freedoms guaranteed by article III, section 22 of the *West Virginia Constitution*, known as the "Right to Keep and Bear Arms Amendment."

(Emphasis supplied.) 377 S.E.2d at 145-49.

If the use of arms is subject to regulation, then regulation of the right to possession may be the only practical way to make an effectual regulation of the use. For example, if the use of arms by persons of unsound mind is to be prohibited, probably the only effectual way to prevent their use is to prohibit the possession of arms by such persons.

It is well known that the identification and tracing of a weapon is an important factor in solving crimes involving the use of a weapon. It is for that reason that identifying marks are sometimes removed from weapons. It would be of little use to prohibit the *use* of weapons from which identifying marks have been removed if the possession of such weapons is lawful. The most effective way to prevent the use of such weapons is to prohibit their possession. Similarly, the most effective way to prevent the use of handguns by felons is to prohibit the possession of handguns by felons.

We think the better view is that reasonable regulation of the possession of arms is not prohibited by the amendment.

In *People v. Blue*, 190 Colo. 95, 544 P.2d 385 (1975), the Supreme Court of Colorado held that a statute prohibiting possession of guns by persons convicted of a felony was not invalid under a constitutional provision guaranteeing [illegible]ight to bear arms. The Colorado constitutional provisio[illegible]s as follows:

> The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons.

Colo. Const. art. II, § 13.

The Colorado court said:

> It is argued that the statute, which prohibits possession, use, and carrying of a weapon, is a blanket proscription that cannot be reconciled with the literal constitutional language. A felon is a "person" within the meaning of Article II, Section 13, the argument runs, and once he has served his term he is reinstated to the full rights of citizenship, *Colo. Const.* Art. VII, Sec. 10, including the absolute right to bear arms.
>
> However, not all constitutional rights are absolute. *Mosgrove v. Town of Federal Heights*, 190 Colo. 1, 543 P.2d 715; *Stapleton, Jr. v. Dist. Ct.*, 179 Colo. 187, 499 P.2d 310; *Anderson v. People*, 176 Colo. 224, 490 P.2d 47, *cert. denied*, 405 U.S. 1042, 92 S.Ct. 1316, 31 L.Ed.2d 583; *United States v. Akeson*, 290 F. Supp. 212 (D. Colo. 1968); *Sigma Chi Fraternity v. Regents of the University of Colorado*, 258 F. Supp. 515 (D. Colo. 1966). When rights come into conflict, one must of necessity yield. The conflicting rights involved here are the individual's right to bear arms and the state's right, indeed its duty under its inherent police power, to make reasonable regulations for the purpose of protecting the health, safety, and welfare of the people. *Cottrell v. Teets*, 139 Colo. 558, 342 P.2d 1016; *Denver v. Denver & Rio Grande Co.*, 63 Colo. 574, 167 P. 969, *aff'd* 250 U.S. 241, 39 S.Ct. 450, 63 L.Ed. 958; *The People v. Hupp*, 53 Colo. 80, 123 P. 651.
>
> We do not read the Colorado Constitution as granting an absolute right to bear arms under all situations. It has limiting language dealing with defense of home, person, and property. These limitations have been recognized by the General Assembly in the enactment of section 18-12-105, C.R.S. 1973, which restricts the right to bear arms in certain circumstances, while permitting in other

> circumstances the carrying of a concealed weapon in defense of home, person, and property, and also when specifically authorized by written permit.
>
> In our view, the statute here is a legitimate exercise of the police power.
>
> "* * * To limit the possession of firearms by those who, by their past conduct, have demonstrated an unfitness to be entrusted with such dangerous instrumentalities, is clearly in the interest of the public health, safety, and welfare and within the scope of the Legislature's police power." *People v. Trujillo*, 178 Colo. 147, 497 P.2d 1.
>
> *See also People v. Trujillo*, 184 Colo. 387, 524 P.2d 1379. To be sure, the state legislature cannot, in the name of the police power, enact laws which render nugatory our Bill of Rights and other constitutional protections. *Lakewood v. Pillow, supra*; *People v. Hinderlider*, 98 Colo. 505, 57 P.2d 894; *Platte Etc., C. & M. Co. v. Dowell*, 17 Colo. 376, 30 P. 68, *appeal dismissed*, 154 U.S. 512, 14 S.Ct. 1150, 38 L.Ed. 1079. But we do not read this statute as an attempt to subvert the intent of Article II, Section 13. The statute simply limits the possession of guns and other weapons by persons who are likely to abuse such possession.

190 Colo. at 102-03, 544 P.2d at 390-91.

In *State v. Ricehill*, 415 N.W.2d 481 (N.D. 1987), the Supreme Court of North Dakota held that a statute prohibiting possession of firearms by convicted felons did not violate that state's constitutional guarantee of the right to keep and bear arms.

The constitutional provision was as follows:

> All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness; and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed.

N.D. Const. art. I, § 3.

The North Dakota court stated:

> Ricehill argues that the right to bear arms is absolute. He argues that the language of the provision states that the right to bear arms "shall not be infringed," and that this means that the Legislature may place no limits on the possession of arms. We disagree with such a broad reading of the provision. Instead, we believe our Constitution's protection of the right to keep and bear arms is not absolute; although it prevents the negation of the right to keep and bear arms, that right nevertheless remains subject to reasonable regulation under the State's police power. As the Michigan Supreme Court stated in construing that State's right to bear arms, "regardless of the basis of the right to bear arms, the State, nevertheless, has the police power to reasonably regulate it." *People v. Brown*, 253 Mich. 537, 235 N.W. 245, 246 (1931).
>
> In this case the Legislature prohibited the possession of firearms by persons who have previously committed serious crimes. It is patently reasonable for the Legislature to conclude that it is protecting the public welfare by enacting legislation that keeps firearms out of the hands of people who have shown a disposition to harm others. The Louisiana Supreme Court stated, in rejecting a State constitutional right-to-bear-arms challenge to its prohibition against possession of a firearm by a felon under a police-power rationale:
>
> "It is beyond question that the statute challenged in the instant case was passed in the interest of the public and as an exercise of the police power vested in the legislature. Its purpose is to limit the possession of firearms by persons who, by their past commission of certain specified serious felonies, have demonstrated a dangerous disregard for the law and present a potential threat of further or future criminal activity." *State v. Amos*, 343 So.2d 166, 168 (La.1977).

415 N.W.2d at 483. The North Dakota court also cited *People v. Blue*, 190 Colo. 95, 544 P.2d 385 (1975), with approval.

We conclude that the statutes in question are reasonable regulations of the right to keep and bear arms and th judgments dismissing the informations were erroneous. Sinc the defendants have not been placed in jeopardy, the cause i each case is remanded for further proceedings.

EXCEPTIONS SUSTAINED, AND CAUSES REMANDED FOR FURTHER PROCEEDINGS.

MUTUAL OF OMAHA, APPELLEE, V. RAYMOND BROUSSARD, APPELLANT.

_____N.W.2d_____

Filed December 1, 1989. No. 89-190.

1. **Workers' Compensation: Appeal and Error.** The findings of fact made by th Workers' Compensation Court after rehearing have the same force and effect a a jury verdict in a civil case and will not be set aside unless clearly wrong.
2. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficienc of evidence to support the findings of fact made by the Workers' Compensatio Court after rehearing, the evidence must be considered in the light mos favorable to the successful party.
3. **Workers' Compensation: Appeal and Error.** Facts determined and finding made after rehearing in the Workers' Compensation Court generally may not b redetermined by the Supreme Court on review.
4. **Workers' Compensation: Witnesses.** As the trier of fact, the Workers' Compensation Court is the sole judge of witnesses and the weight to be given t testimony.
5. **Workers' Compensation.** Generally, issues of causation in workers' compensation cases are for determination by the fact finder.
6. **Workers' Compensation: Proof.** In a workers' compensation case, the burden is on the claimant employee to prove by a preponderance of the evidence that the alleged injury or disability was caused by the employee's employment and that such disability was not the result of the progression of the employee's condition present before the employment-related incident alleged as the cause of such disability.
7. **Workers' Compensation: Presumptions.** There is no presumption from the mere occurrence of an unexpected unforeseen injury that the injury w[illegible] fact caused by the employment.

8. **Workers' Compensation: Proof.** The presence of a preexisting disease or condition enhances the degree of proof required to establish that the injury arose out of and in the course of employment.
9. **Expert Witnesses.** The value of the opinion of an expert witness is no stronger than the facts upon which it is based.
10. **Trial: Expert Witnesses.** The trier of fact is not required to take the opinion of experts in regard to causal connection between alleged injury and disability as binding upon it.
11. **Workers' Compensation: Proof.** A workers' compensation award cannot be based on mere possibility or speculation.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Glenn A. Pettis, Jr., for appellant.

Melvin C. Hansen and Kevin J. Dostal, of Hansen, Engles & Locher, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

HASTINGS, C.J.

Mutual of Omaha brought this action in the Nebraska Workers' Compensation Court naming its employee Raymond Broussard as the defendant. Plaintiff sought a determination of the rights and liabilities of the parties resulting from an alleged accident occurring on November 25, 1985. From a determination by that court on rehearing that the defendant was not entitled to any further benefits, Broussard has appealed. We affirm.

On November 25, 1985, while in a bent-over position attempting to slide or push a box of computer listings weighing approximately 100 pounds, Broussard experienced sharp pains in his lower back and legs. The incident occurred at Mutual of Omaha during the course of Broussard's employment as a research mathematician. Broussard was earning an average weekly wage of $337.34 and was working 40 hours a week.

Broussard has a history of back problems. The first injury to his back occurred in June 1978 while he was serving in the National Guard as a medic. As Broussard was assisting in the unloading of a patient from an ambulance, another medic dropped her part of the litter. He caught the patient, taking the

We the People

THE BILL OF RIGHTS:

A Law-Related Curriculum for High School Students

Lesson 7:
Due Process of Law

Written by

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We the People

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Funding for this project is provided by a grant from the Nebraska Committee for the Humanities, an affiliate of the National Endowment for the Humanities and grants from the Cooper Foundation, the Walter Scott Jr. Foundation, the Robert Veach Foundation, and the Winthrop and Frances Lane Foundation.

TABLE OF CONTENTS

Lesson Seven: Due Process of Law

Introduction 6

Goal 9

Objectives 9

Activities 9

Media Resources 10

Teaching Instructions

Activity 7-A: Tom Horn 12

Activity 7-B: What Process is Due? 14

Activity 7-C: A Welfare Mother Versus the State 18

Activity 7-D: The Rights of Minors-- Due Process vs Parental Authority 19

Student Materials

Activity 7-A: Tom Horn: An Honorable Gentleman or a Miserable Murderer? 23

Activity 7-B: What Process is Due? 24

Activity 7-C: A Welfare Mother Versus the State 25

Activity 7-D: The Rights of Minors -- Due Process vs Parental Authority 27

BILL OF RIGHTS
CURRICULUM EVALUATION
HIGH SCHOOL

Teacher ____________________

School ____________________

Grade ____________________

Lesson taught ____________________

A. Please rate your degree of agreement/disagreement with the following statements:

	Totally Agree			Totally Agree	
1) The lesson was well suited to my students' conceptual level.	1	2	3	4	5
2) The lesson provided new information.	1	2	3	4	5
3) The lesson presented concepts and information in a better manner than do traditional texts.	1	2	3	4	5
4) The lesson meshed well with our course outline for the semester	1	2	3	4	5
5) I personally learned something from the lesson.	1	2	3	4	5
6) The materials were complete enough for good presentation.	1	2	3	4	5
7) I feel the lesson will be thought provoking for students (stimulate out of class thought & discussion).	1	2	3	4	5
8) I can pick up on the lesson in subsequent classes.	1	2	3	4	5
9) I think the lesson challenged some students' attitudes.	1	2	3	4	5
10) The lesson incorporated, built upon material we have already covered.	1	2	3	4	5
11) I was able to use the lesson *as is*.	1	2	3	4	5
12) I *adapted* the lesson in my presentation.	1	2	3	4	5
13) I would consider using more such materials in my classes.	1	2	3	4	5
14) I feel the materials are deficient in some way.	1	2	3	4	5

Please respond to the questions on the next page also.

Mail completed form to:
Alan Frank, University of Nebraska, College of Law, Lincoln, NE 68583-0902

B. Please answer the following:

1) Describe students' reaction/participation to this lesson:

2) What do you consider the best point of this lesson/activity?

3) What suggestions do you have for adapting or modifying this lesson/activity?

4) Were the materials adequate? How could they be improved?

Lesson 7
DUE PROCESS OF LAW

We the People

INTRODUCTION

> **No person shall . . . be deprived of life, liberty, or property, without due process of law.**
> *-5th Amendment, U.S. Constitution*
>
> **Nor shall any State deprive any person of life, liberty, or property, without due process of law.**
> *-14th Amendment, U.S. Constitution*

Beyond enumerating specific individual fundamental rights — such as freedom of speech and religion, beyond mandating specific processes for certain governmental interactions with individuals — such as the requirement for grand jury indictments, the authors of the Bill of Rights recognized the necessity to establish some principles that would guide and restrain all government encroachment upon the fundamental human interests of life, liberty, and property. These principles are embodied in the concept of "due process of law."

This ultimate limitation on arbitrary governmental action lies in the Fifth Amendment: "No person shall be deprived of life, liberty, or property, without due process of law..." Over 100 years ago, this same language, with one important variation, was again included in an amendment to the Constitution: "...nor shall any *State* deprive any person of life, liberty, or property, without due process of law..." The Fourteenth Amendment operates to impose upon the state governments the same due process requirement as the Fifth Amendment imposes upon the federal government.

The right to due process means that the government cannot infringe upon citizens' rights without fair procedures. Fair procedures have been interpreted to mean, at a very minimum, that the government must give citizens some notice of the action it plans to take and that the citizens must have an opportunity to respond — to be heard.

Due process does *not* mean that the *result* of the fair procedures will be favorable to the citizen. Due process does assume, however, that the results of the fair procedures will be the achievement of justice.

The first step in coming to an understanding of how due process works is to ask: Is the citizen entitled to fair procedures? The answer to this question depends upon the extent to which a proposed government action will infringe upon a citizen's life, liberty, or property, including the specifically enumerated individual rights listed in the Constitution.

For criminal actions, in which the citizen faces a potential loss of life or liberty, some of the basic due process requirements are set out in the Fourth, Fifth, Sixth, and Eighth Amendments. However, with regard to non-criminal actions, the response is not at all clear or consistent. Civil due process cases are most immediately concerned with whether a citizen's life, liberty or property has been threatened by government action. For example, in *Goldberg v. Kelly*, 397 U.S. 254 (1970), the initial question was whether a welfare recipient had a property interest in public assistance payments. Justice Black, in dissent, said no, that such payments were not a property entitlement; however, Justice Brennan, for the majority, said yes.

If the court finds that a substantial deprivation of a protected life, liberty, or property interest is involved, the government must employ due process procedures. The next question is: What kinds of procedures are required?

For the criminally accused, the process which is due is embodied in the concept of a fair trial: a speedy, public hearing before an impartial judge and a jury of one's peers; an adversarial process in which the accused, through the effective assistance of counsel, may confront and cross-examine his or her accusers and present evidence in defense; and a process in which the accuser must prove the guilt of the accused, beyond a reasonable doubt. However, the implementation of the criminal due process procedures is not static, but subject to change with time and interpretation. This flexibility gives rise to continual change in actual procedures used by the police and the courts.

The Constitution does not provide a similar outline for the process due in civil matters, aside from the Seventh Amendment's provision for a right to a jury trial in all federal civil cases in which the matter in dispute is in excess of $20.

In determining the elements of civil due process, the courts use a *balancing test* to decide what procedures are minimally necessary, in a given case, to afford the citizen rightful protection without, at the same time, imposing more expense and burden on the government than is necessary. The traditional forms of criminal due process, such as right to counsel and an impartial judge, are used as a guide, but not uniformly imposed.

Civil due process, in its most basic form, may be satisfied through some form of notice and an opportunity for a hearing. The actual form of the notice and hearing may vary widely depending upon how the balancing test mentioned above works out in any particular case.

For example, in short-term school suspension cases the Supreme Court, in *Goss v. Lopez*, 419 U.S. 565 (1975), said that due process may be satisfied through a brief meeting between a student and principal, in which the principal informs the student that a suspension is impending for a rules infraction and the student is given an opportunity to explain. In contrast, in Goldberg the court said that if welfare recipients were not accorded some minimal due process prior to the termination of their benefits, the resulting harm would be "brutal" and "unconscionable" to those recipients who did not deserve to have their rights terminated. Therefore, before cutting off public assistance payments to a welfare recipient, the recipient must have some opportunity for a hearing before an impartial person, at which counsel may be present and the claimant may confront and cross-examine witnesses.

With all the varying judicial interpretations of what constitutes minimal due process, it is important to remember that the judicial decree orders only the *minimum*. Nothing prohibits the government agency from doing more than the minimum.

This introduction, as well as many of the activities in this lesson, are adapted from an article by Patricia McGuire which appeared in the Winter 1981 issue of ***Update on Law Related Education*** *published by the American Bar Association. They are used with the permission of the American Bar Association.*

GOAL

To understand the meaning and importance of due process and to assess how due process is applied in specific cases.

OBJECTIVES

As a result of this lesson, students will be able to:

1. Define the term "due process" and find specific references to due process in the extended Bill of Rights *(Activity 7- A)*.
2. Apply due process procedures to factual situations *(Activity 7-B)*.
3. Compare their own opinions regarding the scope of due process in a particular case to opinions of the Supreme Court *(Activity 7-C)*.
4. Create a statute providing constitutional due process procedures *(Activity 7-D)*.

ACTIVITIES

		Teaching Instructions	**Student Materials**
Activity 7-A.	Tom Horn: An Honorable Gentleman or a Miserable Murderer?		
Activity 7-B.	What Process Is Due?		
Activity 7-C.	A Welfare Mother Versus the State		
Activity 7-D.	The Rights of Minors — Due Process vs. Parental Authority		

MEDIA RESOURCES

DUE PROCESS OF LAW
The Fifth Amendment to the Constitution guarantees due process of law. But when should due process, which is time consuming, give way to summary punishments in order to avoid the immediate threat of violence and anarchy? This question is argued by lawyers in a hearing to reinstate a student who has been summarily suspended after a campus demonstration. The viewers are asked to decide the issue. From *Bill of Rights in Action* series, BFA Educational Media, 1971, 23 minutes, color.

DUE PROCESS
An inquiry-oriented program designed to involve students in the actual decision-making process of the Supreme Court. This filmstrip dramatizes an actual case involving the right to due process. The class is invited to interpret the case before hearing the actual Supreme Court verdict. Through actual involvement with the issues, students acquire an awareness of the variable and interpretive nature of the law. From *Constitutional Law In Action* series, New York Times, sound filmstrip, color.

THE JURY SYSTEM: JUDGMENT BY ONE'S PEERS
Are juries truly representative of the American conscience? Do they fit the image of the conflict-ridden "Twelve Angry Men"? The system of judgment by one's peers is deeply rooted in our legal tradition — but is it the only equitable method of decision-making? Behind-the-scenes looks at selection and sequestering of juries and at common courtroom procedures are presented in this Special Report, which encourages students to evaluate alternatives to the American jury system. Guidance Associates, sound filmstrip, color.

We the People

TEACHING INSTRUCTIONS

Activity 7-A:

Tom Horn

Purpose: To introduce students to the term "due process" and to its use in the Bill of Rights.

Student Materials: "Tom Horn: An Honorable Gentleman or a Miserable Murderer?" reading, pp. 22-23.

Directions:

1. *Tom Horn:* Instruct the class to read the story of Tom Horn. Discuss the story with the students, asking the following questions:

   a. Should Tom Horn have been convicted of murder?

      1. What was the evidence that convicted Horn?

      2. How reliable was that evidence?

      3. Should his "confession" have been admitted as evidence? Why or why not?

   b. The ancient Romans had a saying: *En vino est veritas*-- In wine there is truth! What does this mean?

      1. If this saying is true, why should Tom Horn's confession be used?

      2. Why shouldn't his confession be used?

   c. What is the purpose of a trial?

   To find the truth; to achieve justice.

   d. What methods should be used to find the truth?

   e. Were the methods used to convict Tom Horn fair? Why or why not?

2. *Definition Brainstorm:* Discuss with the class the concept of due process. Ask the students to define in their own words the term "due process." See if the class can reach consensus on one definition.

3. *Due Process in the Bill of Rights:*

   a. Ask the students to find specific references to due process in their copy of the extended Bill of Rights (see Lesson 1, Activity 1-C) or write on the chalkboard:

   5th Amend: No person shall...be deprived of
   life, liberty, or property without due process of law...

   14th Amend: Nor shall any State deprive any
   person of life, liberty, or property, without
   due process of law...

b. Discuss the following questions:

1. What does the Fifth Amendment say?
2. What does the Fourteenth Amendment say?
3. What is the difference between the Fifth and Fourteenth Amendments?

   As covered in Lesson 1, the first ten amendments (the "Bill of Rights") were added to the Constitution to protect the people against the potential abuse of power by the new federal government. Thus the Fifth Amendment's due process clause applies only to the federal government. The Fourteenth Amendment, added to the Constitution after the civil war, was designed to assure that state governments would treat people fairly.

4. What is meant by "life, liberty, and property?"
5. Are there other places in the extended Bill of Rights where aspects of the interests of life, liberty, and property are also protected?

c. You may wish to share with the class the following insight of U.S. District Judge Warren Urbom, which was published in the July 4, 1987 edition of the Lincoln Star:

> Urbom points to due process as "perhaps the most magnificent concept" in the Constitution.
>
> "It is a majestic concept. Nothing can be taken away from a person by government except by a process known in advance and developed to provide fairness.
>
> "Arbitrary and capricious actions are simply forbidden."

Activity 7-B:
What Process is Due?

Purpose: To introduce the students to due process analysis.

Student Materials: "What Process is Due?" hypothetical incidents, pp. 24-25.

Directions:

1. Explain that analyzing due process cases involves two steps:

> **First — When does it apply? When is one entitled to fair procedures?** The answer depends upon whether a government action substantially infringes upon a person's *life, liberty, or property*. There is no constitutional requirement of due process unless there is government action and unless a *life, liberty, or property* interest is involved.
>
> **Second — What kinds of procedures are required?** Generally, in answering this question, the courts try to balance the importance of the procedures to the individual against the time and expense the procedures would impose on the government. For instance, the right of a person not to be found guilty of a crime and sentenced to prison without fair procedures is important enough to justify a lengthy and expensive jury trial at considerable cost to the state. On the other hand, the state may prevent someone from obtaining a driver's license — a less important interest — on the say-so of a driving examiner with no need to give the applicant a hearing prior to denying the license.

2. Assign the class to read the hypothetical incidents and to determine (a) whether the person or persons involved have a right to due process and (b) if so, what procedures would be appropriate under the balancing test.

3. Lead a discussion of the hypotheticals, encouraging the students to articulate their own views supported by cogent reasoning.

Comments on the Hypothetical Incidents:

1. Is a life, liberty, or property interest involved here? As a child is not considered property, a liberty interest seems the most appropriate. The U.S. Supreme Court has held that a parent has a constitutionally protected liberty interest in the relationship with his or her child. *Stanley* v. *Illinois*, 405 U.S. 645 (1972). This being the case, what procedures are required to protect the father's interest? The *Stanley* case said he is entitled to a hearing before his relationship with the child is terminated. Does that mean the state must require that all fathers of illegitimate children must be notified and either voluntarily give up their rights or be given a hearing to determine their fitness? What if we cannot identify or find the father? What if identifying and finding the father and holding the hearing would take a long time? What happens to the baby in the meantime? Shouldn't we be concerned with the baby's welfare first and foremost? Instead of having to identify the father, shouldn't the father have demonstrated enough interest in the child so that his identity is clear before he has any due process rights? If the father has not demonstrated any interest in the child, shouldn't the state be able to cut off his rights without a hearing? What about the father that does not know about the birth of his child? All these questions have greatly troubled courts and legislatures.

After the *Stanley* decision, the Nebraska legislature passed a statute cutting off the rights of a father of a child born out of wedlock to block an adoption desired by the mother unless the father filed with the Department

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of Social Services within five days of the birth of the child a notice of intent to claim paternity. Neb. Rev. Stat. 43-104-02. If he files the notice, he has a right to a hearing to determine his fitness to properly care for the child and to determine whether giving him custody would be in the child's best interest. If he does not file the notice on time, he has no such right. In *Shoecraft v. Catholic Social Services*, 222 Neb. 574 (1986), the Nebraska Supreme Court said that the statute did not violate due process when applied to a father who knew about the child's birth, but who filed the required notice nine days after the birth rather than five days. The process was constitutional in view of the need to achieve a legitimate state purpose — the placement of children as soon as possible. In *In re application of S.R.S. and M.B.S.*, 225 Neb. 759 (1987), the court held the statute unconstitutional as applied to a father who had had daily contact with his child for the first 19 of the 24 months of the child's life. This is consistent with decisions of the U.S. Supreme Court affording greater rights to fathers who have established a substantial relationship with their children than to those who have not.

2. A driver's license is a privilege, not a right. Does this mean that once a state decides to grant the privilege of driving to all qualified drivers, it may withdraw the privilege from a few without any procedures to guarantee fairness? The U.S. Supreme Court has said, "no." Since the government has taken control of who may drive automobiles on its highways, when it revokes someone's driver's license, that person is entitled to a hearing to determine the basis for the revocation. *Bell v. Burson*, 402 U.S. 535 (1971). The privilege of driving, once granted, is a **liberty** interest.

What sort of hearing needs to be provided under these facts? What arguments can Gilbert make — that he was not guilty of the offenses? He has already pled guilty to them and he had a right to a trial on the issue of his guilt or innocence which he chose to by-pass. As there has been, in essence, a prior judicial determination of his violation of traffic laws, no hearing appears necessary at this time. What if the state officials miscalculated his points? Is a full- scale pre-revocation hearing required or is Gilbert's right to point out the error after his license is revoked enough? In *Dixon v. Love*, 431 U.S. 105 (1977) the U.S. Supreme Court said no pre-revocation hearing is required in cases like this, in view of the state's interest in administrative efficiency and the public's interest in safety on the roads and highways.

3. The Supreme Court has never said that there is a constitutional right to an education at public expense. Does that mean that a public school can suspend a student from school without fair procedures? No, according to the Supreme Court in *Goss v. Lopez*, 419 U.S. 565 (1975). Where state law requires public education, the state may not withdraw that right absent fundamentally fair procedures. The Court recognized a student's legitimate entitlement to a public education as a **property** interest and the good name, reputation, honor, and integrity of a person, which is at stake when that person is charged with misconduct, as a **liberty** interest. However, is the loss of only ten days, less than five percent of the normal 180-day school year, severe or grievous enough a loss to invoke the due process clause? The five person majority in Goss v. Lopez said, "yes"; the four person minority said, "no". If there is a due process right involved here, what process is due? The Court in *Goss v. Lopez* said:

> The difficulty is that our schools are vast and complex. Some modicum of discipline and order is essential if the educational function is to be performed. Events calling for discipline are frequent occurrences and sometimes require immediate, effective action. Suspension is considered not only to be a necessary tool to maintain order but a valuable educational device. The prospect of imposing elaborate hearing requirements in every suspension case is viewed with great concern, and many school authorities may well prefer the untrammeled power to act unilaterally, unhampered by rules about notice and hearing. But it would be a strange disciplinary system in an educational institution if no communication was sought by the disciplinarian with the student in an effort to inform him of his dereliction and to let him tell his side of the story in order to make sure that an injustice is not done.

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We do not believe that school authorities must be totally free from notice and hearing requirements if their schools are to operate with acceptable efficiency. Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. The clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school.

There need be no delay between the time "notice" is given and the time of the hearing. In the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred. We hold only that, in being given an opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing and what the basis of the accusation is.... Since the hearing may occur almost immediately following the misconduct, it follows that as a general rule notice and hearing should precede removal of the student from school.... [H]owever, ...there are recurring situations in which prior notice and hearing cannot be insisted upon. Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable....

In holding as we do, we do not believe that we have imposed procedures on school disciplinarians which are inappropriate in a classroom setting.

****

We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident. Brief disciplinary suspensions are almost countless. To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness. Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process.

On the other hand, requiring effective notice and informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action.

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We should also make it clear that we have addressed ourselves solely to the short suspension, not exceeding 10 days. Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures. Nor do we put aside the possibility that in unusual situations, although involving only a short suspension, something more than the rudimentary procedures will be required.

> The dissenting justices believed that even an informal hearing was unnecessary, arguing that "school authorities must have broad discretionary authority in the daily operation of public schools.... Few rulings would interfere more extensively in the daily functioning of schools than subjecting routine discipline to the formalities and judicial oversight of due process." In addition, "Education in any meaningful sense includes the inculcation of an understanding in each pupil of the necessity of rules and obedience thereto."

Another interesting case is *Ingraham v. Wright*, 430 U.S. 651 (1977), which involved the due process rights of a child who was paddled by his teacher. The Court held that the child was subjected to a loss of liberty, but that this liberty interest was adequately protected by state law allowing the child to seek damages for the physical harm he suffered if the punishment was excessively or unjustifiably inflicted. Therefore, no pre-punishment hearing was necessary.

4. The essential guarantee of the due process clauses is that the government may not imprison or otherwise physically restrain a person except in accordance with fair procedures. This protects the person's interest in **physical liberty**. Thus there must be some fair procedure for determining whether an individual has lawfully been taken into custody by the government. Must the youths be given a hearing before they are arrested? The courts have said no; an individual may be arrested without prior judicial approval, but such arrest must be based on probable cause — that is, the police must have a good reason to believe that the person committed a crime. Do good reasons exist here?

Should the youths go to trial, due process requires that the government prove that they are guilty of the crime charged beyond a reasonable doubt. Other procedural safeguards afforded those accused of crimes are guaranteed by the Fourth, Fifth, Sixth, and Eighth Amendments.

5. If a property owner opposed the rezoning, he or she could certainly claim that a property interest was involved. Could the property owner demand a hearing on the wisdom of the zoning change? Does it make any difference that the zoning was changed by the city council, composed of accountable elected officials? In other words, is the right to participate in the political process through the right to vote due process enough? Generally the answer is yes. When a legislature passes a law which affects a general class of people (here all landowners and residents of the area), these people have all received procedural due process — the legislative process. Similarly, an administrative agency may make decisions that are of a legislative or general rulemaking character. In many cases, however, state law and/or local ordinances require public notice and hearings before zoning changes can be made, but this is not constitutionally required.

6. This sounds unfair. Does it violate the Constitution's due process clauses? No, there is no state action involved. Bill's Burritos, even if as big and powerful as McDonald's, is not the government. Whether the manager can fire Melinda at will or must use fair procedures depends upon state law, not the Bill of Rights.

If Melinda were fired from a government job, the answer might be different. If the government position is clearly terminable at the will of the employee's superiors, the employee has neither a property nor a liberty interest in its continuance. If, however, the employee is dismissed for publicly disclosed reasons of incompetence or dishonesty that would tend to foreclose future employment opportunities, he or she will be entitled to a hearing to contest the basis for the charges and to clear his or her reputation — a **liberty** interest. In addition, if the government gives the employee assurances of continued employment or of dismissal for only specified reasons, there must be a fair procedure to protect the employee's **property** interest when the government seeks to discharge him or her from the position.

Enrichment Exercise: Ask the students to think about incidents in which they or someone they know had been treated fairly or unfairly by a public agency. Examples might include encounters with the police or juvenile justice system, experiences encountered on a summer job or other work experience, a consumer problem, or a school discipline experience. Ask volunteers to relate their experiences. Then discuss with the class why each example of treatment was fair or unfair and what could or should have been done differently.

Activity 7-C:

A Welfare Mother Versus the State

Purpose: To provide further practice in due process analysis using the unidentified opinion strategy.

Student Materials: "A Welfare Mother Versus the State" fact situation and questions, pp. 26-27; three unidentified opinions, pp. 28-29.

Directions:

1. Direct the students to read the fact situation, then lead a discussion of the questions.

2. Assign the students to read the three opinions on pp. 28-29. Ask each student to identify which opinion most closely matches his or her own opinion and to explain the reasons why. If time permits, the opinions can be used as the basis of a more formal classroom debate.

Note: The fact situation is based on the U.S. Supreme Court case of *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). Opinion 3 paraphrases the majority opinion of Justice Brennan, opinion 2 paraphrases Justice Black's vigorous dissent, and opinion 1 represents a compromise position.

243

Activity 7-D:

The Rights of Minors — Due Process vs. Parental Authority

Purpose: To evaluate students' understanding of due process by having them participate in a legislative drafting exercise.

Student Materials: "The Right of Minors — Due Process vs. Parental Authority" reading, pp. 30-31.

Comment: The case study used in the activity is based on *Parham v. J.R.*, 442 U.S. 584 (1979), in which the Supreme Court *upheld* a Georgia statute similar to the one used in the John Doe case. While upholding the dominant role of parents in deciding to commit a child, the Court also found that the independent determination of the doctor was sufficient to protect minimum due process requirements. In the *Parham* case, the majority argued:

> It is not disputed that a child, in common with adults, has a substantial liberty interest in not being confined unnecessarily for medical treatment and that the State's involvement in the commitment decision constitutes state action under the Fourteenth Amendment....
>
> Our jurisprudence historically has reflected western civilization concepts of the family as a unit with broad parental authority over minor children.... [O]ur constitutional system long ago rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally "have the right coupled with the high duty, to recognize and prepare [their children] for additional obligations."... Surely, this includes a "high duty" to recognize symptoms of illness and to seek and follow medical advice. The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More importantly, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.
>
> ************
>
> Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state.
>
> ************
>
> In defining the respective rights and prerogatives of the child and parent in the voluntary commitment setting, we conclude that our procedures permit the parents to retain a substantial, if not dominant role in the decision, absent a finding of neglect or abuse, and that the traditional presumption that the parents act in the best interest of their child should apply. We also conclude, however, that the child's rights and the nature of the commitment decision are such that parents cannot always have absolute and unreviewable discretion to decide whether to have a child institutionalized. They, of course, retain plenary authority to seek such care for their children, subject to a physician's independent examination and medical judgment.

The Court went on to say that a full scale adversary hearing was not necessary. It would pose a "significant intrusion into the parent-child relationship" and could "exacerbate whatever tension already existed between the child and the parents" which would "adversely affect the ability of the parents to assist the child while in the hospital" and upon his or her return home.

While agreeing with the result in this particular case, three justices wrote a separate opinion which reflected their concerns about allowing parents to "voluntarily" commit their children:

> In our society, parental rights are limited by the legitimate rights and interests of their children.... Notions of parental authority and autonomy cannot stand as absolute and invariable barriers to the assertion of constitutional rights by children.... [T]he parent- child dispute at issue here cannot be characterized as involving only a routine child-rearing decision made within the context of an ongoing family relationship.... [H]ere a break in family autonomy has actually resulted in the parents' decision to surrender custody of their child to a state mental institution. In my view, a child who has been ousted from his family has even greater need for an independent advocate.

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> The presumption that parents act in their children's best interests, while applicable to most child-rearing decisions, is not applicable in the commitment context. Numerous studies reveal that parental decisions to institutionalize their children often are the results of dislocation in the family unrelated to the children's mental condition. Moreover, even well-meaning parents lack the expertise necessary to evaluate the relative advantages and disadvantages of in-patient as opposed to out-patient psychiatric treatment.

Directions:

1. The students may be given the reading as homework several days before the class in which it is to be discussed. As part of a homework assignment, the students should be instructed to:

   a. Decide with which group of legislators they find themselves most in sympathy;

   b. Roughly rewrite the statute reflecting their policy position.

2. Divide the class into three groups to represent the various legislative positions.

3. Have each group of legislators work as a group to rewrite the statute according to their stated positions. The students should bring to the groups the drafts they wrote for homework.

4. At the end of the rewriting time, ask a spokesperson for each group to read the proposed new statute to the class. If time and space permit, the drafts can be written on the chalkboard or on transparencies for overhead projector use.

5. The subsequent discussion may take a full-scale legislative debate format, with each proposal being introduced, debated, amended, and voted upon. For a suggested format for a legislative hearing, see Lesson 6, Activity 6-C. If time does not permit a legislative debate, guide students in a comparative analysis of the three statutes.

6. Discuss the following questions: Should children have due process rights similar to adults in cases like this? (Generally, adults cannot be committed against their will unless found to be mentally ill and dangerous to themselves or others.) In what other kinds of situations might the same problem arise?

7. Explain the holding of *Parham* — that, in fact, the Supreme Court did uphold a statute, very similar to the one in the John Doe case, which required only the commitment decision of the parents and an evaluation of a doctor in order to commit a juvenile. (See Comment above.)

8. Explain that although the U.S. Supreme Court upheld this statute, the Supreme Court ruling establishes only the minimum due process requirements that all states must meet. States can, however, through state statutes, increase the procedural due process requirements.

Enrichment Exercise: The students can compare the statute they created with the Nebraska Mental Health Commitment Act (83- 1001 through 83-1078 Neb. Rev. Stat.). The act, which contains a number of due process guarantees, does not provide any special rules for the commitment of minors. In January of 1987, however, the State Department of Justice issued an "Advisory Opinion Regarding Involuntary Admission of Minor Children by Their Parents" to the Department of Public Institutions. In the opinion the Attorney General concluded that under the authority of the state's guardianship statutes, specifically the authority of a parent to act on behalf of a minor child (30-2608 Neb. Rev. Stat.), parents and legal guardians may involuntarily admit their minor charges to a state institution on an emergency basis during a crisis situation for up to seven days. A neutral fact finder - - such as a doctor or the superintendent of the hospital — would have to review the case within 36 hours of the child's admission. At the end of seven days, the minor would have the option of voluntarily signing himself or herself into the institution after discussing the situation with his or her parents and doctors. If the minor then decides that he or she wants to be discharged, but the parents or guardian feel that it is in their child's best interest to stay for treatment, the parents or guardian would have to demonstrate to the juvenile court that it would be inappropriate to release the minor. The court could appoint an attorney to represent and protect the minor's interest.

We the People

STUDENT MATERIALS

Activity 7-A

Tom Horn:
An Honorable Gentleman or a Miserable Murderer?

"I have never met a more faithful or better worker or a more honorable man.... I can never believe that the jolly, jovial, honorable and whole-souled Tom Horn I knew was a low-down, miserable murderer!" Those were the remarks of Al Seiber, former Chief of Scouts of the U.S. Army, when he heard Tom Horn stood accused of the murder of Willie Nickell.

Tom Horn was a remnant of the "Old West." A former army scout, Pinkerton detective, and soldier in the Spanish-American War, Horn became a stock detective (a hired gun) in 1901 for John Coble, a cattle baron whose ranch was near Laramie, Wyoming. Although the "Range Wars" of the 1890's had subsided, there were still hostilities and clashes between the cattle ranchers and sheepherders.

In 1903 two homesteader families in the Laramie area, the Millers and the Nickells, were feuding. During this feud, Jim Miller stabbed Kels Nickell. Although Nickell survived the feud, his 14-year-old son, Willie, was not as fortunate. Young Willie was ambushed near his home, dying soon after the attack from a gunshot wound.

At the murder inquest there was no hard evidence showing that the Millers had shot Willie. The Millers testified that Tom Horn was to blame for the killing. Horn, as a stock detective for Coble, was a natural suspect for the Nickell murder since Kels Nickell had made many enemies in the Laramie area for introducing sheep to a cattle range. Although the evidence against Horn was non-existent and he was not brought to court, Deputy U.S. Marshal Joe LeFors was convinced that Horn had killed Willie, and set out to prove that Horn was indeed the murderer.

After the inquest Horn went to Chicago where he heard about a vacancy for a stock detective in Montana. Interested in the job, Horn headed for Montana, only to get as far as Omaha, where he broke his journey, drank too much, and started bragging about his exploits. In Omaha, Horn lost his belongings and returned to Wyoming. While assembling his things at Coble's ranch, Horn received a note from LeFors, who asked to meet him in Cheyenne.

Horn set out for Cheyenne, but stopped in Laramie and once more got drunk. By the time he reached LeFors in Cheyenne he was inebriated. LeFors managed to get Horn to the marshal's office, where Horn, slumped over in a chair and unable to move, began to talk drunkenly. Horn described in detail how he had killed young Willie, while his every boast was taken down by a hidden stenographer. This "confession" was used to arrest, try, and convict Horn, even though when sober he denied killing Willie, claiming that he had merely been boasting of deeds he had never committed. Although he protested that the evidence had been rigged against him, on November 20, 1903, Tom Horn was hanged for the murder of Willie Nickell.

Activity 7-B

What Process is Due?

For each of the incidents described below determine:

a. Whether the person or persons involved has a right to due process — that is, whether there is government action and whether a substantial life, liberty, or property interest is involved

b. If so, what procedures would be fair.

1. An unwed father does not want his girlfriend to put their child up for adoption, but state law requires only the mother's consent for the adoption of children of unmarried parents.

2. Gilbert, in the two years he has had a driver's license, has received a number of tickets for driving violations. He has pled guilty and paid the fines. For each violation he has had "points" assessed against him. He has now accumulated 12 points in a two-year period and, in accordance with state law, his driver's license has been automatically revoked for six months.

3. The principal of the public high school is told that Carlos created a disturbance in the school lunchroom which involved some physical damage to school property. He is suspended from school for ten days.

4. Downtown merchants have complained for several weeks about teenagers hanging out downtown disturbing the merchants' customers. The police spot four 15 - 16 year-old youths standing outside of Bill's Burritos and take them to the local police station for loitering.

5. To stimulate commercial growth, the city council rezones a family residential area for commercial development.

6. Melinda has a job working at Bill's Burritos, a fast food restaurant. The restaurant manager fires her because he believes that she has been stealing money from the cash register, although he does not explain why he thinks she is the thief.

Activity 7-C

A Welfare Mother Versus the State

Mary Johnson is an unmarried mother of three children, ages six months, three years, and four and one-half years. Since the birth of her first child, Mary has been receiving public assistance payments under the Aid to Families with Dependent Children program (AFDC). Mary is unemployed. Mary's social worker has urged her to return to school to complete her high school diploma and acquire some secretarial training. The social worker has also urged her to try to get a job. He even arranged for several job interviews, which Mary refused. Mary feels that she cannot leave her children at this stage in their lives.

Six months ago the social worker reported to the AFDC Board that Mary was not cooperating with his efforts to get her a job. Several weeks after that report, AFDC stopped making payments to Mary. When Mary went to the AFDC Board to protest, she was told that a hearing would be scheduled if she desired to appeal the decision. At the hearing, which was scheduled for two weeks later, was a member of the AFDC Board, the social worker, and Mary.

Mary was never advised as to whether she could bring an attorney or other representative and the few guidelines available for the hearing process did not mention attorneys. The guidelines simply stated that, after payments are cut off, the welfare recipient had a right to appeal to a member of the AFDC Board, who will hear the recipient's side of the case and make a decision. In Mary's case, the decision to cut off her payments was upheld by the AFDC board member at her hearing.

Questions

1. What are Mary's interests in this case? Do they fall within the "life, liberty, or property" interests mentioned in the Bill of Rights? Why or why not?

2. What has happened to Mary's interests in this case? To what degree, if any, have her interests been harmed?

3. What are the interests of the government in this case? Why doesn't the AFDC Board conduct a hearing before the decision is made to terminate someone's welfare payments?

4. Should Mary be accorded some kind of due process?

5. If Mary is allowed due process, what kinds of procedures would be fair?

250

Activity 7-C

A Welfare Mother Versus the State

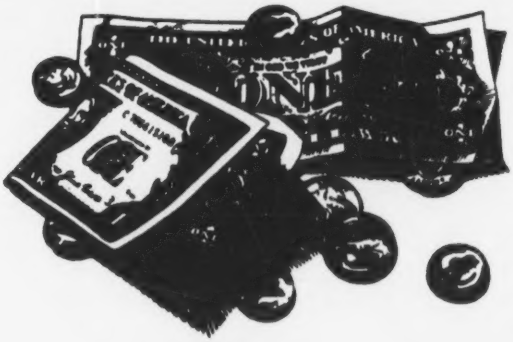
Below are three court opinions in the case of a welfare mother versus the state. Which opinion do you believe is the most correct one? For what reasons?

Opinion 1

Welfare payments are a property interest for those individuals who qualify to receive them. However, while Mary does have some property interest, her due process rights were not violated in this case because she was given an opportunity to be heard after the benefits were ended. Due process does not always require very formal proceedings, and providing a full-blown hearing would be unduly burdensome for the government in this kind of case.

Opinion 2

Welfare payments are a gift from the taxpayers. No one has a right to receive them. Therefore, no one can claim a property interest in them. Courts must act responsibly in ruling on due process claims, to ensure that we do not interfere with proper legislative and agency functions. The agency acted responsibly in proving some minimal hearing procedures, which were more than sufficient. If every welfare case had to be heard before the termination decision was made, millions of taxpayers' dollars would be wasted, both in the expense of the hearing processes and in the continuation of welfare payments to individuals who should not be receiving them.



Opinion 3

Welfare payments are indeed a property interest for those who are eligible to receive them. Moreover, it is brutal and extremely unfair for the government to terminate payments to people who may well deserve to continue to receive them. For a mother with three young children, even one day without the necessary income can be a horror. The interest of saving money by prompt termination of payments to possible ineligible recipients does not outweigh the interest of ensuring no unjust interruption of payments to people who really need and may well be entitled to the income. Ultimately in this kind of case the defenseless children are really the ones who must suffer. Process is due to all the Marys of the country, and it must be given before the decision is made to end payments.

Activity 7-D

The Rights of Minors —
Due Process vs. Parental Authority

The State of Aksarben has had this law on the books for a number of years:

> The parent or guardian of any child under the age of 18 may commit such child to the care of the Superintendent of Midlands State Mental Hospital for observation and diagnosis. If the Superintendent finds, after the observation and diagnosis period, that said child suffers a mental illness, upon consent of the parents, the Superintendent may detain the child for care and treatment for any length of time deemed necessary.

John Doe, 14 years old, posed behavioral problems for his parents and teachers since he was a small child. After several years of a variety of unsuccessful treatments, John's parents applied for his commitment to Midlands State Mental Hospital, and John was admitted. A lawsuit was brought on John's behalf, alleging that his commitment violated his right not to have his liberty curtailed without due process of law. Attorneys for John's parents and for the State of Aksarben argued that John's due process rights were protected by the actions of his parents.

The Supreme Court of Aksarben upheld a lower court finding in John's favor. The court held that a child's due process rights did exist independently of the parent's actions and that those rights could only be protected by according the child an opportunity for a hearing on the issue of commitment. At a minimum, said the court, the child should have an independent advocate and an opportunity for a hearing if one is requested.

The legislature of Aksarben now faces the task of rewriting the statute. There are three distinct positions among the legislators:

Position 1: This group feels that the legislature should conform exactly to what the Supreme Court of Aksarben said, including no more and no less than what the court intended and ordered.

Position 2: This group feels that the court's decision did not go far enough, and that the statute should be rewritten to include extensive procedural protections for the child.

Position 3: This group feels that the court is interfering with family life and the authority of parents; this group wants to rewrite the statute to conform to the letter of the court's decision, but keep the spirit that parental authority over children has top priority.

The Bill of Rights

A Law-Related Curriculum for High School Students

Lesson 8: Search and Seizure and the Right to Privacy

Lesson 8

Search and Seizure and the Right to Privacy

INTRODUCTION

> *The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*
>
> Fourth Amendment to the U.S. Constitution.

Nowhere in the Constitution or its Amendments are U.S. citizens guaranteed a right to privacy. Or are we? The words 'right to privacy' do not appear anywhere in the Constitution or Bill of Rights, but inferences of such a right may be drawn from numerous themes throughout those documents.

The First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments guarantee protection which can be interpreted to include a right to privacy. Nowhere is the right to privacy more strongly emphasized than in the Fourth Amendment.

George Orwell's 1984 would not be possible in a society which valued and enforced the protection of the Fourth Amendment. Without the Fourth Amendment our personal privacy as we drive down the road, the privacy of our homes, and more, would be in jeopardy.

Citizens of the U.S. value their individuality and privacy. We expect the Fourth Amendment to prevent police from searching or arresting us without a warrant. And we expect the warrant to be issued only upon probable cause. Our lives remain private until we give the police a reason to suspect us of criminal activity.

How much of a suspicion must the police have? Upon what may they base their suspicion? How do police obtain a warrant? Can they ever arrest me without a warrant? Under what circumstances? Can they search my car if they stop me for a traffic ticket? By exploring the Fourth Amendment and how it has been interpreted by judges we hope to be able to answer these and other questions.

Goals

To understand what makes a search and an arrest constitutionally valid. To understand the conflict between privacy rights and crime control.

Objectives

As a result of this lesson students will be able to:

1. Compare the privacy rights of individuals with the public's need to control crime.
2. Comprehend the requirements of arrest and search warrants.
3. Analyze the exceptions to arrest and search warrants.

TABLE OF CONTENTS

Item Page

Introduction.......... 1
Goal, Objectives, Table of Contents.......... 2
Media Resources.......... 3

Teaching Instructions

Activity 8-A Privacy and Crime Control: Can We Have It Both Ways?.......... 7
Activity 8-B The Warrant Requirements..........11
Activity 8-C Searches Without Warrants..........13

Student Materials

Activity 8-A Big Brother Is Watching..........17
Activity 8-B Giving Meaning To The Phrase 'Probable Cause'..........19
Is This Warrant Valid?..........20
Affidavit for Search Warrant..........21
Search Warrant (sample)..........22
Activity 8-C Searches Without Warrants--Exceptions To The Warrant Requirement..........23
Fourth Amendment Checklist..........25
The Horseshoe Ring..........27

MEDIA RESOURCES

FORGOTTEN FREEDOMS (PART 1: 4th & 5th Amendments)

This 1/2" VHS videocassette explores the protection of the Fourth and Fifth Amendments through a scenario in which both amendments are non-existent. Police are allowed to search and arrest without adherence to warrant requirements. From ABA/Young Lawyers Division, Texas Young Lawyers Association, 11 minutes, color.

THE RIGHT TO PRIVACY

What constitutes an unreasonable invasion of privacy? In this 1/2" VHS videocassette, an electronic surveillance by the police results in the issuance of a search warrant. Arrests are made and evidence is seized. Attorneys argue whether the constitutional right to privacy of the accused was violated by the surveillance. The film is left open-ended. Award winning fill from Bill of Rights in Action series, BFA Educational Media, 23 minutes, color.

THE BILL OF RIGHTS IN ACTION--THE RIGHT TO PRIVACY

(Part 1: Drug Testing City Employees)
Middleburg (a fictional community) city council debates whether a controversial proposal to conduct random drug tests of city employees is in violation of privacy guarantees; background legal memoranda and discussion questions available. American Bar Association, 35 minutes, color.

(Part 2: AIDS in the Classroom)
Middleburg (a fictional community) school board addresses the constitutional right to privacy in an emotionally charged meeting on the issue of AIDS in the classroom; scenario is open-ended to promote audience discussion; background legal memoranda and discussion questions available. American Bar Association, 22 minutes, color.

TEACHING
INSTRUCTIONS

Activity 8-A
Privacy and Crime Control: Can We Have It Both Ways?

Purpose: To foster discussion among students of the costs and benefits of privacy in the context of crime control.

Student Materials: Big Brother Is Watching, page 17.

Directions:

1. Introduce the topic by relating the following stories to students:

Note to teacher: The first two stories are from "The Right to Privacy "Goode & Watts." The third story is based upon the case of Mapp v. Ohio, 367 U.S. 643 (1961). The fourth story is based upon State v. Abdouch, 230 Neb. 929 (1989).

Perhaps the most flagrant abuse of the right to privacy is when the police are breaking down citizens' doors to gain access to their homes. Consider these two examples:

* At ten o'clock in the morning of January 9, 1973, fifteen well-armed police officers smashed the front door and broke into the home of the Pine family. The three members of the family - Mr. and Mrs. Pine and their thirteen-year-old daughter, Melody - were at home. Mr. Pine, who worked nights, was asleep upstairs. Mrs. Pine and Melody were downstairs in the living room.

A few of the police held Mrs. Pine and Melody at gunpoint, forcing them to remain seated on a living room couch. Others ran upstairs where they awakened Mr. Pine and kept their guns trained on him.

The terror continued for fifteen minutes, until the police discovered the true name of the family. When the name "Pine" was supported by identification cards presented by Mr. and Mrs. Pine, the fifteen officers left the house. The people they had wanted to arrest lived next door.

* The story of the Conforti family of Massapequa, New York, is even more striking. One evening, two agents from the Federal Bureau of Narcotics and Dangerous Drugs knocked on the Conforti door and declared that they had a warrant that permitted them to search for $4 million that was supposed to be hidden somewhere on the Conforti property. The agents said that the money had been taken from the sale of illegal drugs.

John Conforti explained that he knew nothing about the money and did not sell illegal drugs. But the two agents nevertheless entered the house, along with twenty other men. For twenty-four hours, the agents smashed furniture, ripped up walls, tore up the backyard patio, and dug holes in the lawn in search of the money, which was not found. They left the Conforti home in shambles.

John Conforti was a roofing contractor and a respected businessman in his community. He had never been arrested. But his wife's brother, Louis Cirillo, had been. Cirillo had recently been convicted of selling narcotics and police had found nearly $1 million buried in his backyard. An unidentified informer had told police that another $4 million would be found at the Conforti home.

Frank Monastero, the regional director of the Bureau of Narcotics and Dangerous Drugs, found no reason to apologize for the actions of his agents. In an interview with Time magazine, he declared that his men had acted reasonably. "We didn't send a lot of guys in with instructions of 'you pound here' and 'you pound there,'" he explained. "We went through a series of progressive steps. Whether or not this was reasonable is up to the courts to decide. I personally felt that it was."

Each year, similar searches and seizures occur throughout the United States. Usually, they are carried out by over-zealous police officers or federal agents who believe they are on the track of genuine criminals.

Many times, however, illegal searches by police turn up evidence of alleged criminal activity.

* In May of 1957 Cleveland police arrived at the home of Dollree Mapp. They had received information that a person wanted for questioning in connection with a recent bombing was hiding in her house. They knocked and demanded entrance. Ms. Mapp immediately phoned her lawyer, who advised her not to let them in. Several hours later, the police returned with additional officers. Again they knocked, and again she refused them entrance. This time the police broke down the door.

Once they were in her home she demanded to see a search warrant. One officer held up a paper, claiming it was a warrant. She quickly snatched the paper from him and placed it beneath her clothing. A struggle ensued during which the police recovered the paper.

A thorough search of the house revealed no sign of the bombing suspect but the police did find "some allegedly pornographic literature" in a trunk located in her basement. Although the police had not, as it turned out, obtained a valid warrant prior to the search, Ms. Mapp was tried and convicted for possession of these materials.

The U.S. Supreme Court eventually reversed her conviction, holding that "all evidence obtained by search and seizure in violation of the Constitution is, by that same authority, inadmissible in a state court."

* In June of 1987 Terry Clark died. His ex-wife asked the Douglas County Sheriff's Department to assist her in securing Terry's belongings from his and his girlfriend's (Jean Abdouch) farmstead. No search warrant or court order authorizing entry on the premises were issued.

The ex-wife and sheriff's deputies were admitted to the house by a babysitter for Abdouch's children. The search of the house, barn and surrounding premises yielded evidence of a marijuana growing operation.

The Nebraska Supreme Court reversed Abdouch's conviction on the charge of manufacturing a controlled substance, marijuana. The Court held that the evidence found as a result of the illegal search should have been suppressed and, therefore, not introduced at Abdouch's trial.

2. Discuss with students that the purpose of the Fourth Amendment is to prevent the types of intrusions into our privacy related in these four stories. But also discuss that the last two stories indicate the need to strike a balance between crime control efforts and privacy. The tough task is how to find that balance.

3. Ask students to read the story "Big Brother Is Watching." While reading they should be thinking about the costs and benefits of privacy in this situation.

4. Divide the class into 3 groups:
   a) the school board;
   b) students opposed to the recommended policies of the principal; and
   c) the principal and students who support the recommended policies.

Groups b) & c) should prepare arguments supporting their positions. They should also be ready to answer questions from board members. Allow each group some time to prepare their presentations. Designate a board chairperson. Have that person call the meeting to order and state the purpose of the meeting.

The principal will go first in explaining why the recommended policies are needed. Then other supporters of the policies should present their arguments. When they are finished, the board members may ask questions. The opponents of the policies should have equal time to present their arguments and answer questions from board members.

When both sides are finished have board members deliberate and reach a decision in front of the class.

Follow up the exercise with a discussion of the costs and benefits of privacy versus crime control.

Activity 8-B
The Warrant Requirements

Purpose: To familiarize students with when and how a government official must obtain a warrant to "search or seize."

Student Materials:
Giving Meaning to the Phrase 'Probable Cause,' page 19.
Is This Warrant Valid? page 20.

Directions:

1. Ask students to read the Fourth Amendment and then "Giving Meaning to the Phrase 'Probable Cause.'"

2. Ask students to write a definition of probable cause. Students' definitions will vary, but should include the following information: "Probable cause exists when there are enough facts to persuade a reasonable person to believe that a crime has been or is being committed."

3. Ask students to examine the Affidavit and Search Warrant on the pages entitled "Is This Warrant Valid?" and to give answers to the questions. Suggested answers are as follows:
    a. John H. Nelson, Nebraska State Patrolman.
    b. DOE's SURPLUS & SALVAGE.
    c. a truck wrecker with winch; a welding machine; and a forklift.
    d. theft of government property.
    e. report of property missing; defendant seen driving one of the missing items; defendant selling the other two items to the officer.
    f. David L. Piester, U.S. Magistrate.
    g. Yes. Probable cause appears to exist in the affidavit and the warrant specifically describes the property to be searched and the items to be seized. Also, the affidavit was sworn to by the officer.

Activity 8-C
Searches Without Warrants

Purpose: To make students aware of circumstances under which constitutionally valid searches may be conducted without warrants.

Student Materials: Exceptions To The Warrant Requirement, pp. 23-24.
Fourth Amendment Checklist, pp. 25-26.
The Horseshoe Ring, pp. 27-28.

Directions:

1. Discuss with students the two sections "Exceptions To The Warrant Requirement" and "Fourth Amendment Checklist."

2. Ask students to test their knowledge of the Fourth Amendment by reading and answering the questions in the "Horseshoe Ring." Suggested answers are as follows:

    1) Based upon the reasoning of the U.S. Supreme Court in Greenwood v. California, this search is legal because there is no reasonable expectation of privacy in your garbage.

    2) You would probably want two types of information:

a) information about the informant's reliability. That is, has she provided accurate information before? How often? and

b) information about the informant's tip. That is, how does she know about the "pits"? When did she see or hear about them? What specifically did she see or hear?

    3) According to the U.S. Supreme Court decision of California v. Ciraolo the helicopter flyover is considered a legal tactic for police to use.

    4) No. Even though they are cousins, Fats' consent is not valid for Tyrone's home. It is only the consent to search your own person, belongings or place which is valid. The times when a third person may validly consent to a search of someone else's belongings or place are severely limited (e.g., a parent for a minor child).

    5) By the time the police stop the limo they may have probable cause to do so. The helicopter flyover gave them evidence of illegal activity at the Tree Estate. Although the police have no particular reason to believe the limo is carrying illegal substances, they have reason to believe at least one suspect may be trying to flee to avoid arrest.

6) Once they stopped the limo they might have a right to search the briefcase spotted in the back seat. If the police arrest Tyrone then they can search anything in the passenger compartment as a search incident to arrest - to locate a concealed weapon or avoid destruction of evidence. See New York v. Belton, 453 U.S. 454 (1981).

7) Once the Trees were legally arrested on suspicion of horseshoe manufacturing, they could be 'frisked' or 'patted down' to discover concealed weapons or prevent destruction of evidence.

8) Does not appear to be any emergency circumstances preventing the police from obtaining a search warrant. Vehicle exception to warrant requirement? Perhaps.

9) Answers may vary according to the analyses of the eight previous answers. This might be a good time, however, to discuss the exclusionary rule as the primary means by which courts enforce Fourth Amendment protection.

In Weeks v. United States, 232 U.S. 383 (1914), the Supreme Court ruled that evidence obtained by federal officers conducting an illegal search and seizure of a defendant or the defendant's property cannot be used in criminal proceedings against the defendant. In Mapp v. Ohio, 367 U.S. 643 (1961), this exclusionary rule was uniformly applied to all state proceedings.

Through the years, the exclusionary rule has been a continued source of controversy. Those in favor of the rule argue that is deters police abuses in searches and seizures, protects the integrity of the courts by prohibiting judicial ratification of illegal practices, and insures that governmental illegality will be challenged. Those against the rule argue that since both the illegally seized evidence and the "fruits" thereof (evidence directly or indirectly derived from the illegal evidence) are excluded, relevant evidence becomes inadmissible because of the "technically" illegal seizure, thus allowing a guilty defendant to go free. Other arguments against the rule are that it engenders widespread public disrespect for the judicial process and has not been shown to be a deterrent to police abuses in searches and seizures.

In order that evidence of crimes may be used even in some cases where police may have conducted an illegal search, judges have created exceptions to the exclusionary rule. 'Inevitable discovery' and 'good faith' are two examples.

STUDENT
MATERIALS

Activity 8-A
Big Brother Is Watching

It started on the first day of school with two incidents reported, one at City Elementary School and the other at City Junior-Senior High School. At City Elementary three second graders were slapped, punched and kicked and had their pocket money taken. At the junior-senior high two students reported being beaten because they would not buy "crack."

Every day for the next week there were several students at both the elementary and high schools who were beaten and robbed. All witnesses gave the same description: a person 5 1/2 feet tall who wore a Ronald Reagan mask and a City High School letter jacket.

School officials were baffled. To prevent further incidents and to apprehend the person or persons responsible for these attacks the principals of the two schools had called a special meeting of the school board to recommend adoption of the following precautions:

1. installation of closed circuit television cameras in all areas of the school, to be monitoredconstantly during school hours; and
2. a stop and search order of all students fitting the known description (i.e., all who are approximately 5 1/2" tall). Such persons areto be questioned as to their whereabouts during the time when each of the known incidents occurred and be subjected to locker and pat down searches for the mask and jacket.

SUGGESTED QUESTIONS FOR BOARD MEMBERS TO ASK OF THE TWO GROUPS

Questions to ask of the Group which is **FOR** The Policies	Questions to ask of the Group which is **AGAINST** The Policies
Aren't there other methods of dealing with this problem which would be less intrusive into students' privacy rights?	Is privacy more important than student safety?
Students are entitled to privacy even on school grounds, aren't they?	Can you suggest other effective ways of dealing with the problem which would not interfere with students' rights?

Activity 8-B
Giving Meaning To The Phrase "Probable Cause"

Review the Fourth Amendment. According to this amendment, when may a warrant be issued?

The judicial branch of government is sometimes asked to interpret the law. The interpretation gives meaning to the law in specific circumstances. In the case of the Fourth Amendment, the U.S. Supreme Court has been called upon in hundreds of cases to interpret various aspects of this amendment.

In order to obtain a search warrant, law enforcement officials must first present a judge with an affidavit, which is a sworn statement describing the facts and reasons justifying the issuance of a search warrant. The facts and reasons must be based upon "probable cause."

In 1925, the U.S. Supreme Court issued the following opinion regarding "probable case:"

> *To establish probable cause, the government must present to the judge sufficient facts to permit an independent determination as to whether the government agent or police officer had reasonable grounds at the time of his affidavit ...for the belief that the law was being violated on the premises to be searched; and if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a warrant.*
> Dumbra v. United States, 268 U.S. 435, 439-441 (1925)

Using this opinion, write a definition explaining the meaning of "probable cause." Before writing your definition, you may wish to consider the levels of proof often cited by judges from the least sufficient to the most sufficient level:

Least Sufficient Proof				Most Sufficient Proof
Guess or Hunch	Reasonable Suspicion	Probable Cause	Preponderance of Evidence (Burden of proof in civil trials)	Beyond a Reasonable Doubt (Burden of proof in criminal trials)

ACTIVITY 8-B
"Is This Warrant Valid?"

Examine the "Affidavit For Search Warrant," page 21, and the "Search Warrant On Written Affidavit," page 22.

After examining both pages, answer the following questions:

a. Who is requesting the search warrant?

b. What is the name of the place he wants to search?

c. What type of property is he looking for?

d. What is the crime allegedly being committed?

e. What facts/grounds are included in the affidavit to support the issuance of a warrant?

f. Who issued the warrant?

g. In your opinion, is this a legally issued and valid search warrant? Explain your answer.

AO 106
Rev 9/82

AFFIDAVIT FOR SEARCH WARRANT

United States District Court

DISTRICT
NEBRASKA

United States of America
vs.
John Doe

DOCKET NO.

MAGISTRATE'S CASE NO.
88- 611 (DLP)

NAME AND ADDRESS OF JUDGE[1] OR U.S. MAGISTRATE
David L. Piester
United States Magistrate
District of Nebraska
Lincoln, Nebraska 68508

The undersigned being duly sworn deposes and says: That there is reason to believe that

☐ on the person of ☒ on the premises known as

DISTRICT
NEBRASKA

Doe's Surplus & Salvage, located three miles west of the intersection of First Street and Green Street, Neligh, Nebraska, at the southeast corner of an unlabeled dirt road which runs into U.S. Highway 275. Doe's Surplus and Salvage consists of an L shaped building and the salvage yard directly north, west, east and south of the building.

The following property (or person) is concealed:

One International Harvester Truck Wrecker w/ winch, 6x6, 6 cyl., 5 spd., yellow, SN816
One welding machine, arc, SN 2A78642.
One forklift, Allis Chalmers Mdl. AC 6 MB-230, 6000 rated capacity.

Affiant alleges the following grounds for search and seizure[2]

I am currently assigned to an investigation of theft of government property from the Nebraska State Surplus Property (NE SASP) in Lincoln, NE. In November, 1987 the above described property was reported missing from NE SASP. At about the same time John Doe was observed driving the wrecker into his salvage yard by an employee of NE SASP. At about the same time this affiant attempted and did purchase from John Doe the welding machine and the forklift.

☐ See attached affidavit which is incorporated as part of this affidavit for search warrant

Affiant states the following facts establishing the foregoing grounds for issuance of a Search Warrant

See above. There is currently concealed on the premises of the Salvage yard the three items described above, because the affiant did not remove the items upon purchase, but indicated that he would return to remove them.

SIGNATURE OF AFFIANT
John H

OFFICIAL TITLE, IF ANY
Nebraska State Patrolman

Sworn to before me, and subscribed in my presence:

DATE
May 31, 1988

263

~~JUDGE~~ OR US MAGISTRATE
David L. Piester
DAVID L. PIESTER

---

[1] United States Judge or Judge of a State Court of Record.
[2] If a search is to be authorized "at any time in the day or night" pursuant to Federal Rules of Criminal Procedure 41(c), show reasonable cause therefor

AO 93
(Rev. 8/82)

SEARCH WARRANT ON WRITTEN AFFIDAVIT

United States District Court	DISTRICT NEBRASKA
UNITED STATES OF AMERICA v. John Doe	DOCKET NO. / MAGISTRATE'S CASE NO. 88- 6M
	TO: John H. Nelson, Nebraska State Patrol, or any officer of said agency

Affidavit(s) having been made before me by the below-named affiant that he/she has reason to believe that (on the ~~person of~~) (on the premises known as) DOE 'S SURPLUS & SALVAGE, located 3 miles west of 1st St. and Green St., Neligh, NE, at the southeast corner of an unlabeled dirt road which runs into Hwy. 275.

in the ______ District of Nebraska there is now being concealed certain property, namely

1. One (1) 2300-1953 IHC Truck Wrecker w/winch, 6x6, 6 cyl. 5 spd., yellow, SN 816.
2. One (1) welding machine, arc, SN 2A78642
3. One (1) forklift mast i
Allis Chamlers Mdl. AC 6MB-230, 6000 Rated Capacity.

END

and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the person or premises above-described and the grounds for application for issuance of the search warrant exist as stated in the supporting affidavit(s),

YOU ARE HEREBY COMMANDED to search on or before June 9, 1988, (not to exceed 10 days) the person or place named above for the property specified, serving this warrant and making the search (in the daytime — 6:00 A.M. to 10:00 P.M.) ~~(at any time in the day or night)*~~ and if the property be found there to seize it, leaving a copy of this warrant and receipt for the property taken, and prepare a written inventory of the property seized and promptly return this warrant to David L. Piester
U S ~~Judge or~~ Magistrate
______ as required by law.

NAME OF AFFIANT	SIGNATURE OF ~~JUDGE OR~~ US MAGISTRATE	DATE/TIME ISSUED
JOHN H. NELSON, Special Agent		5/31/88

*If a search is to be authorized "at any time in the day or night" pursuant to Federal Rules of Criminal Procedure Rule 41(c), show reasonable

Activity 8-C
Searches Without Warrants

1. Read "Exceptions To The Warrant Requirement" and "Fourth Amendment Checklist."
2. Then test your knowledge by answering questions in "The Horseshoe Ring."

Exceptions To The Warrant Requirements

Although the police are generally required to get a search warrant prior to conducting a search, the courts have recognized that there are a number of situations when searches may be legally conducted without a warrant.

Consent to Search A person may give permission to law enforcement officers to search her and her property. If this permission is given voluntarily then no warrant is required. Generally, a person may only grant permission to search herself and her own belongings. Courts have recognized, however, certain circumstances where a person may legally consent to a search of another person's property (e.g., parent-child).

Border and Airport Searches These searches involve a type of implied consent. That is, everyone choosing to travel by air is aware of, and thereby agrees to, the use of metal detectors and searches of carry-on luggage. Everyone coming to the U.S. from a foreign country is aware of, and thereby agrees to, have their vehicle, baggage, purse, wallet or similar belongings searched by customs officers at the border.

Search Incident To A Lawful Arrest This is the most common exception to the warrant requirement, and it allows the police to search a lawfully arrested person and the area immediately around that person for hidden weapons or for evidence that might be destroyed.

Stop and Frisk A police officer with a reasonable suspicion (based on more than just a 'hunch') that a person has committed, is committing, or is about to commit a crime, and that the person may be armed, is allowed to stop and frisk that person without a warrant. This exception to the warrant requirement was created to protect the safety of the officers and bystanders.

Vehicle Searches The courts have recognized a police officer's authority to search a vehicle for illegal substances (often referred to as contraband). However, the police officer must have probable cause to believe the vehicle contains contraband before he stops and searches it.

Plain View If an object connected with a crime is seen by an officer from a place where she has a right to be, the object may be seized without a warrant. For example, if a police officer is patrolling in a neighborhood and from her car sees several marijuana plants growing in someone's yard, the officer may seize the marijuana plants without a warrant.

Hot Pursuit Police in hot pursuit of a criminal suspect are not required to obtain a search warrant to enter a building into which they have seen the suspect enter.

Emergency Situations Courts have upheld warrantless searches in the following emergency situations: searching a building following a telephoned bomb threat; entering a building after smelling smoke or hearing screams; and other emergencies involving preservation of life or health.

ACTIVITY 8-C
Fourth Amendment Checklist

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." Fourth Amendment to the U.S. Constitution.

CHECKLIST

The following series of questions constitute one method of determining if a warrant is required, and if so, if it is valid.

1. Is the Fourth Amendment Applicable?

   a. Has a "search" or "seizure" taken place?

   ___ yes
   ___ no

   A "search" is defined as any governmental intrusion into something in which a person has a "reasonable expectation of privacy." This privacy interest covers real property and personal belongings.

   A "seizure" is any taking into possession, custody or control. An arrest is one form of seizure. This is because in making an arrest the police take someone's person into custody. For this reason, arrests fall under the requirements imposed by the Fourth Amendment.

   b. Was the search or seizure a government action (i.e., done by the police or their agents)?

   ___ yes
   ___ no

   Remember that actions by private individuals are not covered by the Fourth Amendment. If, for example, your mother or father searched your room and turned evidence of a crime over to the police, your rights under the Fourth Amendment would not have been violated.

If you answered **no** to either a or b, stop here. The Fourth Amendment is not applicable.

If you answered **yes** to both a and b, go on to part 2 to determine if the search or seizure was conducted according to the requirements of the Fourth Amendment.

2. Has The Fourth Amendment Been Satisfied?

a. Was the search or seizure conducted with a valid warrant?
___ yes
___ no

For the warrant to be valid there must be:
1) probable cause (facts and circumstances known by an officer which are sufficient to justify a reasonable person to believe that a crime has been or is about to be committed; and the person, place or thing to be searched or seized is related to that crime);
2) stated in an affidavit from the officer; and
3) specific descriptions of:
   a) the place to be searched, and
   b) the persons or things to be seized

b. If no valid warrant exists, does one of the recognized exceptions to the warrant requirement apply?"
___ yes
___ no

If the answer to either a or b is yes, the search or seizure is valid.

If the answer to both a and b is no, the search or seizure was not legal and any evidence seized may not be used at a trial to convict the defendant. Also, if the seizure (arrest) is illegal, the person arrested must be set free unless there are other valid reasons for which she may be detained.

ACTIVITY 8-C
"The Horseshoe Ring"

The United States Congress, to stop the recent rage of horseshoe pitching from further corrupting our nation's youth, passes by a two thirds majority (an override of the presidential veto was necessary) a bill into law which states:

> "Any person in possession of horseshoes or horseshoe pitching equipment, or engaging in the pitching of horseshoes, shall be guilty of a Class E felony."
>
> "A Class E felony is punishable by no more than one year in prison and/or $1,000 fine for each offense."

After the law became effective, the following events took place:

1. Acting on a tip from a reliable informant that there were several horseshoe 'pits' being used at the Flower residence, police began stopping the Broz Brothers Refuse truck as it left the Flower home. All bags of garbage from the Flower household were methodically searched by police.

   In more than one of the bags police found broken horseshoes, empty pork rind bags, empty Lone Star beer cans and other signs of the evils associated with horseshoe pitching. Police immediately arrested everyone in the Flower residence on suspicion of manufacturing horseshoes.

   During questioning 'Fats' Flower agreed to give police some information. Fats told police that most of the horseshoes and the other equipment used at his family's 'pits' came from his cousin's place in the country - Tyrone Tree's estate.

   Police asked Fats if he would consent to a search of the Tree Estate. Fats consented and the police sent their new helicopter out to survey the Tree Estate and report back. In their fly over the Tree Estate, the police helicopter team reported seeing bins of horseshoes stacked on the grounds. They also spotted trays of horseshoe molds being moved by forklift into one of the barns.

As police vehicles were converging on the Tree Estate to search the premises, a limousine was spotted driving out of the front gates. Fats Flower, who was riding with police, said the limo belonged to his cousin, Tyrone Tree. Police stopped the limo and asked all occupants for identification. One officer noticed a briefcase on the back seat. Inside the briefcase police found orders for horseshoes and related equipment and price lists for these same items. Tyrone Tree and his family were placed under arrest and each person was patted down for weapons. The Tree limo was taken to police headquarters and systematically searched for evidence. In the locked trunk police found boxes of solid silver horseshoes with the initials TT on them. In their search of the Tree Estate police found a huge horseshoe manufacturing operation.

All of the Flowers and the Trees have now filed motions to suppress the evidence seized at their homes and in their limousine. To determine how you might rule on their motions, read and answer the questions below.

1) Was the search of the Flower's garbage legal? Do the Flower's have a reasonable expectation of privacy in their garbage?

2) If the police had requested a search warrant for the Flower's house based solely upon the informant's tip, would you, as a judge, have given them one? If not, what more information would you require?

3) Was the helicopter flyover of the Tree Estate a legal search?

4) Was Fats' consent valid for a search of the Tree Estate? Why or why not?

5) Did the police have a right to stop the Tree limo? Why or why not?

6) Did the police have a right to search the briefcase which was in the Tree limo? Why or why not?

7) Did the police have a right to pat down the Trees? Why or why not?

8) What about the searches of the limo trunk and the Estate - were these searches legal? Why or why not?

9) Would you, as judge, rule to suppress any of the evidence found in this scenario? Why or why not?

The Bill of Rights

A Law-Related Curriculum for High School Students

Lesson 9: The Fifth Amendment

Lesson 9

THE FIFTH AMENDMENT

Perhaps the best-known provision of the Fifth Amendment is the clause against forced "self-incrimination," whose origin goes back to England where persons accused of crimes before ecclesiastical courts were forced to take an *ex officio* oath. That is, they had to swear to answer all questions even if the questions did not apply to the case at trial. This requirement was later adopted by the Court of Star Chamber.

One of the victims of the Court was a printer and book distributor named John Lilburne, charged in 1637 with treason for importing books "that promoted Puritan dissent." Lilburne told his accusers, "I am not willing to answer you to any more of these questions because I see you go about by this examination to ensnare me. For seeing the things for which I am imprisoned cannot be proved against me, you will get other material out of my examination; and therefore if you will not ask me about the thing laid to my charge, I shall answer to no more.... I think by the law of the land, that I may stand upon my just defense."

Lilburne was fined, whipped. pilloried and gagged, and imprisoned until he agreed to take the oath. The brutality of his treatment helped bring about the end of the Star Chamber. Later he published *An Agreement of the Free People of England*, one of the first proposals ever made for a written constitution. It included a guarantee against forced self-incrimination and a number of other provisions. Some of Lilburne's ideas eventually found their way into the American Bill of Rights.

One notorious instance of forced self-incrimination in the American colonies occurred in the Salem witch trials. In 1692, Giles Corey, an elderly Massachusetts farmer, was accused of witchcraft. He knew whether he pleaded guilty or not guilty he would be convicted, executed and his property confiscated. So to assure that his heirs inherited his property, he refused to plead and thus could not be convicted. The judges ordered him strapped to a table, and stones were loaded upon his chest to force a plea out of him. Corey's final words were "more weight." Then his chest caved in.

At the time of the drafting of the Constitution in 1787, only six of the 13 states had provisions against compelled self-incrimination in their constitutions. When the Constitution was sent to the states for ratification, only four states suggested an amendment against self-incrimination.

Although the right to "take the Fifth" to avoid forced self-incrimination is familiar to most Americans through televised Congressional hearings, the right also protects citizens--guilty and innocent alike--from that power of the police and the courts. "Taking the Fifth" reinforces the idea that one is innocent until proved guilty, and it means that the prosecution must find evidence other than testimony forced from the accused. Today a witness in any governmental proceeding may refuse to answer any question if the answer might be used against him or her in a future criminal proceeding. As the Court has said: "A witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing."

To the charge that the Fifth Amendment is only a shield for the guilty, Justice William O. Douglas answered: "Those who would attach a sinister meaning to the invocation of the Fifth Amendment have forgotten...history. For, from the beginning, the dignity of man cried out against compulsion. If the individuals's spirit of liberty is to be kept alive, if government is to be civilized in its relation to the citizen, no form of compulsion should be used to exact evidence from him that might convict him."

[from *The Bill of Rights and Beyond*, by The Commission on the Bicentennial of the United States Constitution]

The Fifth Amendment to the U.S. Constitution guarantees five distinct protections: the right to an indictment by a grand jury; the right not to be tried twice for the same offense; the right to refuse to be a witness against oneself; the right not to be deprived of life, liberty or property without due process of law; and the right to just compensation for the taking of private property for public use. Only three of the five guarantees are explored in this unit. Due process rights are covered in lesson 7.

GOAL

To know and understand the constitutional rights provided by the Fifth Amendment.

OBJECTIVES

As a result of this lesson, students will be able to:

1. State the purposes for the requirement of a Grand Jury indictment or a prosecutor's information. (Activity 9-A).
2. Recognize situations which violate the prohibition against double jeopardy. (Activity 9-B).
3. Analyze situations in which the Fifth Amendment protects citizens against self-incrimination and those in which it does not. (Activity 9-C).

TABLE OF CONTENTS

Lesson 9: The Fifth Amendment

Introduction.. 1
Goal, Objectives, & Table of Contents.................. 3
Media Resources... 4

Teaching Instructions

Activity 9-A Indictment or Information?.......... 7
Activity 9-B Twice in Jeopardy?.................. 9
Activity 9-C Interrogations & Confessions........13

Student Materials

Activity 9-A Indictment or Information?..........17
Sample Indictment--state............19
Sample Indictment--federal..........21
Sample Information--state...........23
Sample Information--federal.........25
Activity 9-B Twice in Jeopardy?.................29
Activity 9-C Summary of the Law..................33
Roleplay situations.................35
Sample Miranda Warnings............37

MEDIA RESOURCES

TEACHING INSTRUCTIONS

ACTIVITY 9-A
Indictment or Information?

Purpose: To familiarize students with the purposes of a grand jury indictment and a prosecutor's information.

Student Materials: Indictment or Information? pp. 17 & 18.
Sample Indictments - state & federal, pp. 19-22.
Sample Informations - state & federal, pp. 23-27.

Directions:

1. Have students read the sample indictments and information and write answers to the questions on pages 17 & 18.

Suggested answers:

1. The plaintiff?
State Indictment: The State of Nebraska.
Federal Indictment: United States of America.
State Information: The State of Nebraska.
Federal Information: United States of America.

2. The defendant?
State Indictment: Paul L. Douglas.
Federal Indictment: Roy Henry Kappen.
State Information: Benjamin F. Joseph, a/k/a Benjamin F. Nevels.
Federal Information: Roy D. Crosby.

3. The crime(s) with which the defendant is charged?
State Indictment: giving false statements while under oath, and obstruction of justice.
Federal Indictment: manufacture and possession of marihuana.
State Information: murder in the first degree and robbery.
Federal Information: misprison of a felony (concealed a felony by not reporting it to the authorities).

4. Where the alleged crimes took place:
State Indictment: Lancaster County, Nebraska.
Federal Indictment: District of Nebraska.
State Information: Lancaster County, Nebraska.
Federal Information: District of Nebraska.

5. When the alleged crimes took place:
State Indictment: 25th of February, 1984, and 30th of November, 1983.
Federal Indictment: between the 6th of May and 13th of November, 1997.
State Information: 20th of August, 1988.
Federal Information: between the 1st of July and the 15th of August, 1986.

6. Who has determined that charges should be brought against the defendant?

State Indictment: grand jurors of Lancaster County.
Federal Indictment: Grand Jury (foreman's signature).
State Information: Michael Heavican, Lancaster County Attorney.
Federal Information: Michael Norris, Assistant U.S. Attorney.

2. Ask students to share their responses with the rest of the class.

3. Conduct a class discussion of the following questions
   a. What are the differences between an indictment and an information?
   b. Are the processes by which an indictment and an information filed the same? What are the processes?
   c. Are the purposes of an indictment and an information the same? What are the purposes?
   d. Do you see any advantages of an indictment over an information? Of an information over an indictment?

Suggested answers:

a. An indictment is the formal filing of criminal charges by a Grand Jury. An information is the formal filing of charges by a County or District Attorney.

b. No. An indictment is filed after a Grand Jury (of citizens) has conducted an investigation by questioning witnesses and has decided that the person named in the indictment has committed a crime. An information is filed by the County or District Attorney after the police have conducted an investigation, or arrested someone, and the County or District Attorney has concluded that the named person has committed a crime. In one sense, however, the two are the same. That is, both documents are filed with the Clerk of the Court and both are the beginning of the formal proceedings, including a trial, brought against the defendant for the crimes charged.

c. The purposes are the same--to bring formal charges against a defendant, to notify the defendant of the crimes with which he is charged, and to begin the process by which the defendant will be made to answer to the charges.

d. Advantage of indictment: a jury of the defendant's peers must weigh the evidence to determine whether a crime has been committed and that the defendant is the one who committed the crime. An information requires only the prosecutor's decision to bring charges.
An information may have the advantage of taking less time to be filed because a lengthy Grand Jury investigation need not be conducted.

ACTIVITY 9-B
Twice in Jeopardy

Purpose: To familiarize students with the double jeopardy clause of the Fifth Amendment and situations to which it may be applicable and those to which it is not.

Student Materials: Twice in Jeopardy?, pp. 29-31.

Directions:

1. Ask students to read the words of the Fifth Amendment which create the double jeopardy prohibition.
2. Ask students to apply the language of the Fifth Amendment to the hypothetical cases by determining when the Amendment applies to prohibit a second prosecution for the same offense.
3. Discuss students' reasoning for their choices.
4. Ask students to compare their decisions and reasoning with those of the courts.

DISCUSSION OF THE REASONING OF THE COURTS (in hypothetical cases):

1. Burks v. United States, 437 U.S. 1 (1978). It is an established principle that a person may be retried for the same offense when the first (or prior) conviction is set aside (or reversed) by an appeals court. United State v. Ball, 163 U.S. 662 (1986). Therefore, Billy's conviction at the second trial does not violate the double jeopardy clause.

The double jeopardy clause does not apply to retrials after a conviction is reversed on appeal because none of the underlying purposes of the Fifth Amendment would be served. For example, one of the underlying purposes of the Amendment is to preserve the finality and integrity of a NOT GUILTY verdict. Since the verdict on appeal is guilty (otherwise the defendant would not be appealing) it is impossible (and therefore unnecessary) to preserve the finality and integrity of a verdict of not guilty.

Also, the second trial gives the defendant another opportunity to obtain an acquittal (i.e., a verdict of not guilty). Since the original verdict was guilty, the defendant has everything to gain and nothing to lose in a second trial.

The purpose of the second trial is not to put the defendant twice in jeopardy of life or limb for the same offense, but to give the defendant the advantages of a fair trial (which includes eliminating errors for which the original conviction can be reversed).

NOTE TO TEACHER: You may or may not want to point out to students that there is one exception to the rule stated in Ball. That is, if an appellate court reverses a conviction for the primary reason that the evidence presented at trial is insufficient to sustain a verdict of guilty, then double jeopardy does apply and the person cannot be retried.

2. United States v. Sanford, 429 U.S. 14 (1976). Double jeopardy does not bar retrial following a hung/deadlocked jury. There is no finality or integrity of a NOT GUILTY verdict to preserve because, in effect, there was no verdict - the jury could not agree on one.

Since the jury never rendered a verdict the first trial may be considered unfinished. The second trial may be thought of, therefore, as a continuation of the first trial. Until the jury finds the defendant guilty or not guilty, double jeopardy does not apply. In other words, the double jeopardy clause is designed to protect against a second prosecution for the same offense after an acquittal or conviction. Since there has been neither in this case, the state may retry Dorothy and her conviction does not violate double jeopardy principles.

3. Green v. United States, 355 U.S. 184, 187-88 (1957). The brother and cousin are out of luck. See the analysis in #1 above. Bart, however, may not be retired. He was acquitted in the first trial.

This is the type of situation to which the double jeopardy clause is meant to apply. United States v. Ball, "the underlying idea...is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby...enhancing the possibility that even though innocent he may be found guilty."

The double jeopardy clause is designed to prevent the prosecution from using its first trial as a means of discovering the defendant's case and using that information to convict him the second time, or as a way of 'practicing' the state's case in order to 'refine' it for the second time around and enhance the possibility of conviction.

4. North Carolina v. Pearce, 395 U.S. 711 (1969). The state must subtract those years already served from whatever new sentence is imposed on retrial. A harsher sentence may be imposed upon the defendant after retrial, but the reasons for the more severe sentence must be stated in the record. And the reasons must be based upon conduct on the part of the defendant occurring after the time of the original sentencing proceeding. Double jeopardy is

meant to prevent punishing a defendant for appealing their conviction, which is what appears to have happened in Bobbie Sue's case.

5. Ashe v. Swenson, 397 U.S. 436 (1970). Milt should be set free. Since the jury's original verdict found that he was not one of the robbers, the state may not relitigate that same issue. There was only one robbery (and therefore only one crime), even though there were two or more victims.

In general, the double jeopardy clause limits the governments' power to repeatedly try a defendant for the same crime once the defendant has been found not guilty. Milt was found not guilty of the robbery. The second trial was an improper attempt to convict Milt of the same robbery/crime.

6. Heath v. Alabama, 106 S. Ct. 433 (1985). Eugene may be prosecuted by both states. This is what is sometimes called the dual sovereignty doctrine. When two sovereigns derive their prosecutorial power from separate sources, each may prosecute a defendant for the same act. The federal and state governments may try an individual for the same offense within the jurisdiction of their respective courts. The reason is that the federal governments' power to prosecute comes from the federal constitution and laws and the state government's power comes from the state constitution and laws - two separate sources.

The dual sovereignty doctrine, however, does not apply to municipal and state prosecutions because both governments derive their power from a single source - the state constitution.

7. Green v. United States, 355 U.S. 184 (1957). Victoria can be convicted on retrial of no more than second-degree murder. Since the jury had an opportunity to convict her in the first trial of first-degree murder and instead convicted her of second-degree murder, she is considered to have been acquitted of the first-degree murder charge. Since the double jeopardy clause is designed to prevent retrial for the same offense after acquittal, Victoria cannot be convicted of first-degree murder at her second trial.

The jury had a choice of convicting Victoria of first or second degree murder. The judge gave instructions to the jury on both degrees. The jury decided on second degree murder. The same elements must be proven for both degrees, but first degree requires an extra element. Since the jury chose second degree, they must have determined that the extra element necessary to convict Victoria of first degree murder was not present. In effect, that is a verdict of not guilty of first degree murder.

Activity 9-C
Interrogations and Confessions

Purpose: To familiarize students with the right to remain silent and how it has been interpreted by the U.S. Supreme Court.

Student Materials: Summary of the Law, page 33.
Roleplay Situations, pp. 35-36.
Sample Miranda Warnings, pp. 37-39.

Directions:

1. Ask students to read "Summary of the Law."
2. Assign students to roleplay the situations on pp. 35-36. Those students not roleplaying a situation are to act as appellate court judges. After each roleplay, ask students who are judges to decide how they would rule on this issue. Engage class in discussion of the issues and compare the U.S. Supreme Court decisions with those of the students.

U.S. Supreme Court Decisions Upon Which The Role Playing Situations Are Based

Roleplay

#1 Based upon Rhode Island v. Innis, 446 U.S. 291 (1980). The Supreme Court said that the officers comments were merely 'offhand' and did not rise to the level of interrogation. The Court said that interrogation is express questioning and any words or actions by police that they should know are reasonably likely to elicit an incriminating response from the suspect. The Court said that the conversation in this case were not such words.

#2 Based upon New York v. Quarles, 467 U.S. 649 (1984). The U.S. Supreme Court would answer the issue NO! The Court reasoned that the police acted properly in this situation to protect the public. The Court created a public safety exception to the Miranda warnings requirement. To keep the suspect from lunging for the gun and possibly having innocent bystanders shot, the police may ask for the gun before giving Miranda warnings.

#3 Based upon Arizona v. Mauro, 479 U.S. ____ (1987). The police were reluctant to allow the conversation. They agreed only if an officer was present with a tape recorder. The conversation was introduced as evidence at trial to rebut defendant's claim of insanity. The U.S. Supreme Court said the conversation should be admissible because it was not interrogation. It was not interrogation because the police did not initiate it, the suspect's wife did.

STUDENT MATERIALS

ACTIVITY 9-A
Indictment or Information?

After viewing the sample indictments and information on the following pages, write answers to questions 1-6. The first sample is a state indictment. The second sample is a federal indictment. The third sample is a state information. The fourth sample is a federal information.

For each sample list:

1. The plaintiff?

State Indictment: ____________________

Federal Indictment: ____________________

State Information: ____________________

Federal Information: ____________________

2. The defendant?

State Indictment: ____________________

Federal Indictment: ____________________

State Information: ____________________

Federal Information: ____________________

3. The crime(s) with which the defendant is charged?

State Indictment: ____________________

Federal Indictment: ____________________

State Information: ____________________

Federal Information: ____________________

4. Where the alleged crimes took place:

State Indictment: ____________________

Federal Indictment: ____________________

State Information: ____________________

Federal Information: ____________________

5. When the alleged crimes took place:

State Indictment: ______________________

Federal Indictment: ______________________

State Information: ______________________

Federal Information: ______________________

6. Who has determined that charges should be brought against the defendant?

State Indictment: ______________________

Federal Indictment: ______________________

State Information: ______________________

Federal Information: ______________________

CLERK'S OFFICE, DISTRICT COURT
LANCASTER COUNTY, NEBRASKA
FILED
JUN 1 4 1984
Clerk District Court

IN THE DISTRICT COURT OF THE THIRD JUDICIAL
DISTRICT OF NEBRASKA
IN AND FOR LANCASTER COUNTY

THE STATE OF NEBRASKA, Plaintiff, vs. PAUL L. DOUGLAS, Defendant.	Docket ~~[illegible]~~ 66 Page ~~[illegible]~~ 285 INDICTMENT

At the 1984 term of the District Court of the Third Judicial District of the State of Nebraska, in and for Lancaster County and said State, in this year 1984, the grand jurors, chosen, selected and sworn in and for the County aforesaid, upon their oath, present:

COUNT 1

That Paul L. Douglas, on or about the 25th day of February, 1984, in the County of Lancaster, State of Nebraska, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the State of Nebraska, did, after having given his oath or affirmation in a matter where said oath or affirmation was required by law, and before an authority having full power to administer the same, said being the Special Commonwealth Committee of the Legislature of Nebraska, depose, affirm or declare the following matters to be fact, to-wit:

> That he paid income tax on all of the payments he received from Marvin E. Copple for services he performed for Marvin E. Copple.

MICRO FILMED
DATE [illegible] 84
CLERK DISTRICT COURT
LANCASTER COUNTY, NE
ROLL NO. 1539

BEST COPY AVAILABLE

That the payments he received from Marvin E. Copple, for the services he performed for said Marvin E. Copple, totalled Thirty-two Thousand Five Hundred Dollars ($32,500).

That his actions as Attorney General of Nebraska had not been influenced by his business or personal relationships with Marvin E. Copple.

Further, that at the time he, Paul L. Douglas, deposed, affirmed or declared said matters to be fact he knew the same to be false.

COUNT II

That Paul L. Douglas, on or about the 30th day of November, 1983, in the County of Lancaster, State of Nebraska, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the State of Nebraska, did intentionally obstruct, impair or pervert the administration of law or other governmental function by breach of official duty, or other unlawful act, by declaring to David Domina, Special Assistant Attorney General of the State of Nebraska, in a sworn statement, that he, Paul L. Douglas, had not discussed with Marvin E. Copple a letter from the Federal Bureau of Investigation, dated March 10, 1983, when in fact Paul L. Douglas had, at a time prior to said sworn statement, discussed said letter with Marvin E. Copple.

OFFENSE: (1) 28-915(1) Class III Felony
OFFENSE: (2) 28-901(1) Class I Misdemeanor

INDICTMENT: A TRUE BILL

Terry L. Marston
Grand Jury Foreman

FILED
DISTRICT OF NEBRASKA
AT____________M
APR 21 1988
2
William L. Olson, Clerk
By__________Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA)
Plaintiff,)
vs.)
ROY HENRY KAPPEN)
Defendant.)

CR 88-L-08

INDICTMENT
(21 U.S.C. §841(a)(1))

The Grand Jury Charges:

COUNT I

Between on or about the 6th of May, 1987 and the 13th of November, 1987, in the District of Nebraska, ROY HENRY KAPPEN, knowingly and intentionally, did manufacture and possess with intent to manufacture, 1000 kilograms of more of a mixture or substance containing a detectable amount of marihuana, a Schedule I controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1).

A TRUE BILL:

FOREMAN

Ronald D Lahners
RONALD D. LAHNERS
United States Attorney

The United States of America requests that trial of this case be held at Lincoln, Nebraska, pursuant to the rules of this Court.

Ronald D Lahners
RONALD D. LAHNERS
United States Attorney

DEFENDANT INFORMATI… RELATIVE TO A CRIMINAL ACTI… – IN U.S. DISTRICT COURT

BY ☐ COMPLAINT ☐ INFORMATION ☒ INDICTMENT

Name of District Court, and/or Judge/Magistrate Location (City)

NEBRASKA

OFFENSE CHARGED

Manufacture and possession with intent to manufacture marihuana

☐ Petty
☐ Minor
☐ Misdemeanor
☒ Felony

Place of offense: Banner County, NE

U.S.C. Citation: 21 USC Sec 841(a)(1)

DEFENDANT – U.S. vs.

ROY HENRY KAPPEN CR 85-L-28

Address:
Rt 2, Box 526
Bayard, NE

Birth Date: 4/28/30 (Optional unless a juvenile)

☒ Male ☐ Female ☐ Alien (if applicable)

PROCEEDING

Name of Complainant Agency, or Person (& Title, if any)

DEA Special Agent Peter Johnson

☐ person is awaiting trial in another Federal or State Court, give name of court

☐ this person proceeding is transferred from another district per (circle one) FRCrP 20, 21 or 40. Show District

☐ this is a reprosecution of charges previously dismissed which were dismissed on motion of: ☐ U.S. Att'y ☐ Defense

SHOW DOCKET NO.

☐ this prosecution relates to a pending case involving this same defendant

☐ prior proceedings or appearance(s) before U.S. Magistrate regarding this defendant were recorded under

MAGISTRATE CASE NO.

Name and Office of Person Furnishing Information on THIS FORM: MICHAEL P. NORRIS

Asst. ☒ U.S. Att'y ☐ Other U.S. Agency

Name of Asst. U.S. Att'y (if assigned): MICHAEL P. NORRIS

DEFENDANT

IS *NOT* IN CUSTODY

1) ☒ Has not been arrested, pending outcome this proceeding. If not detained give date any prior summons was served on above charges

2) ☐ Is a Fugitive

3) ☐ Is on Bail or Release from (show District)

FILED
AT ___ M
APR 21 1985
William L. Olson, Clerk
By ___ Deputy

IS IN CUSTODY

4) ☐ On this charge

5) ☐ On another conviction

6) ☐ Awaiting trial on other charges

☐ Fed'l ☐ State

If answer to (6) is "Yes", show name of institution

Has detainer been filed? ☐ Yes ☐ No If "Yes" give date filed: Mo. Day Year

DATE OF ARREST

Or... if Arresting Agency & Warrant were not Federal

DATE TRANSFERRED TO U.S. CUSTODY: Mo. Day Year

☐ This report amends AO 257 previously submitted

ADDITIONAL INFORMATION OR COMMENTS

Count 1 - 10mn - life/$4,000,000 - $50 SA

234

[illegible]

The State of Nebraska, } ss. 74-163

LANCASTER COUNTY

In the District Co[illegible]f the Third Judicial District of Nebraska, in and for Lancaster County.

INFORMATION FOR:

I. MURDER IN THE FIRST DEGREE: 28-303(2) F I-A

II. USE OF FIREARMS TO COMMIT A FELONY: 28-1205(1) F III

III. ROBBERY: 28-324(1) F II

IV. USE OF FIREARMS TO COMMIT A FELONY: 28-1205(1) F III

THE STATE OF NEBRASKA

vs.

BENJAMIN F. JOSEPH,
a/k/a BENJAMIN F. NEVELS

MICHAEL G. HEAVICAN, *Lancaster County Attorney by authority of the State of Nebraska, comes here in person into Court at this, the* July *Term, A.D. 19* 88-89*, thereof, and for the State of Nebraska gives the Court to understand and be informed that* BENJAMIN F. JOSEPH, a/k/a BENJAMIN F. NEVELS, *on or about the* 20th *day of* August*, A.D., 19* 88 *in the County of Lancaster, and the State, aforesaid, contrary to the form of the statutes in such cases made and provided then and there being, did* kill Eugene I. Nnakwe in the perpetration of, or attempt to perpetrate, a robbery.

II.

AND THAT BENJAMIN F. JOSEPH, a/k/a BENJAMIN F. NEVELS, in the County of Lancaster, and the State, aforesaid, contrary to the form of the statutes in such cases made and provided then and there being, did use a firearm, knife, brass or iron knuckles, or any other deadly weapon to commit any felony which may be prosecuted in a court of this state, to-wit: Murder in the First Degree.

III.

AND THAT BENJAMIN F. JOSEPH, a/k/a BENJAMIN F. NEVELS, on or about the 20th day of August, 1988, in the County of Lancaster, and the State, aforesaid, contrary to the

AUG 24 88

CLERK DISTRICT COURT
LANCASTER COUNTY

PAGE 1 OF 2 PAGES

form of the statutes in such cases made and provided then and there being, did intentionally forcibly and by violence, or by putting in fear, take from the person of Eugene I. Nnakwe any money or personal property of any value whatever.

IV.

AND THAT BENJAMIN F. JOSEPH, a/k/a BENJAMIN F. NEVELS, on or about the 20th day of August, 1988, in the County of Lancaster, and the State, aforesaid, contrary to the form of the statutes in such cases made and provided then and there being, did use a firearm, knife, brass or iron knuckles, or any other deadly weapon to commit a felony which may be prosecuted in a court of this state, to-wit: Robbery.

County Attorney

Subscribed in my presence and sworn to before me this 24th day of August A.D. 19 88.

Marjorie A. Hart
Clerk District Court

By
Deputy.

FILED
DISTRICT OF NEBRASKA
AT______________M

JUL 18 1988 -2

William L. Olson, Clerk
By _____CAR_____ Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff, vs. ROY D. CROSBY, Defendant.	)	CR 88-L-12 INFORMATION 18 U.S.C. §4

The United States Attorney charges:

COUNT I

Between on or about the 1st day of July 1986, and the 15th day of August, 1986 in the District of Nebraska, ROY D. CROSBY, having knowledge of the distribution of methamphetamines, a felony as prescribed under Title 21, United States Code, Section 841(a)(1) concealed and did not as soon as possible make known said knowledge to a judge or other persons in civil authority.

In violation of Title 18,, United States Code, Section 4.

UNITED STATES OF AMERICA,

By: RONALD D. LAHNERS
United States Attorney

Michael P. Norris

And: MICHAEL P. NORRIS
Assistant U.S. Attorney

The United States of America requests that trial of this case be held in Lincoln, Nebraska, pursuant to the rules of this Court.

Michael P. Norris

MICHAEL P. NORRIS
Assistant U.S. Attorney

AO 455 (Rev. 5/85) Waiver of Indictment

FILED
DISTRICT OF NEBRASKA
AT

JUL 18 1988

William L. Olson, Clerk
By ______ Dep

United States District Court

DISTRICT OF NEBRASKA.

UNITED STATES OF AMERICA
V.
ROY D. CROSBY

WAIVER OF INDICTMENT

CASE NUMBER: CR 88-L- 12

I, Roy D. Crosby, the above named defendant, who is accused of misprision of a felony

being advised of the nature of the charge(s), the proposed information, and of my rights, hereby waive in open court on July 18, 1988 (*Date*) prosecution by indictment and consent that the proceeding may be by information rather than by indictment.

280

ROY D. CROSBY
Defendant

Roy D Crosby

Counsel for Defendant

Dorothy H Halb

Before ______
Judicial Officer

AO 257
(Rev 4/81) 9

DEFENDANT INFORMATION RELATIVE TO A CRIMINAL ACTION – IN U.S. DISTRICT COURT

BY: ☐ COMPLAINT ☒ INFORMATION ☐ INDICTMENT

Name of District Court, and/or Judge/Magistrate Location (City
Nebraska

FILED
DISTRICT OF NEBRASKA
AT
JUL 18 1988 - I
William L. Olson, Clerk
By Dep

OFFENSE CHARGED

Having knowledge of the distribution of methamphetamines and did not as soon as possible make known to proper authorities

☐ Petty
☐ Minor
☐ Misdemeanor
☒ Felony

Place of Offense
Nebraska

U.S.C. Citation
Title 18, Sec 4

DEFENDANT – U.S. vs.
ROY D. CROSBY

Address
520 Arkansas
Adrian, MN

Birth Date
04/02/64

☒ Male
☐ Female

☐ A
(if applic

(Optional unless a juvenile)

PROCEEDING

Name of Complainant Agency, or Person (& Title, if any)
Nebraska State Patrol

☐ person is awaiting trial in another Federal or State Court, give name of court

☐ this person/proceeding is transferred from another district per (circle one) FRCrP 20, 21 or 40. Show District.

☐ this is a reprosecution of charges previously dismissed which were dismissed on motion of:
☐ U.S.Att'y ☐ Defense

☐ this prosecution relates to a pending case involving this same defendant

SHOW DOCKET NO.

☐ If Related Case, Assign to Judge

DEFENDANT

IS NOT IN CUSTODY

1) ☒ Has not been arrested, pending outcome this proceeding
If not detained give date any prior summons was served on above charges
2) ☐ Is a Fugitive
3) ☐ Is on Bail or Release from (show District)

IS IN CUSTODY

4) ☐ On this charge
5) ☐ On another conviction
6) ☐ Awaiting trial on other charges
☐ Fed'l. ☐ State
If answer to (6) is "Yes", show name of institution

Has detainer been filed? ☐ Yes ☐ No
If "Yes" give date filed

DATE OF ARREST Mo. Day Year

Or . . . if Arresting Agency & Warrant were not Federal

DATE TRANSFERRED TO U.S. CUSTODY Mo. Day Yea

Name and Office of
erson Furnishing
nformation on
THIS FORM MICHAEL P. NORRIS

Asst ☒ U.S. Att'y ☐ Other U.S. Agency

ame of Asst. U.S.
tt'y.
f assigned) MICHAEL P. NORRIS

☐ This report amends AO 257 previously submitted

ADDITIONAL INFORMATION OR COMMENTS

LTIES: 3 yrs/$250,000 - $50 SA

TO THE CLERK OF THE COURT.

☐ Request is made for assignment of one of the Judges of the Court

ttorney.

ddress.

DATED.

By.

ACTIVITY 9-B

Twice in Jeopardy?

The Fifth Amendment to the U.S. Constitution has several clauses. One of those is what we call the double jeopardy clause. The double jeopardy clause is designed to prevent prosecution and punishment of a person more than once for the same criminal offense.

Read the words of the Fifth Amendment double jeopardy clause.

> *...nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;*

Now read the hypothetical cases which begin below and state whether you think the prohibition against trying someone twice for the same crime should apply or not. If the double jeopardy prohibition does apply, then the person cannot be tried again. If, however, the prohibition does not apply, the person may be tried again. Give reasons for your choices.

Hypothetical Cases:

1. Bill was convicted by a jury of selling 'crack' cocaine to some of his classmates at school. When Bill and his lawyer appealed the conviction the state supreme court reversed (i.e., the supreme court said that the conviction was not proper). The county attorney who had originally prosecuted Bill refiled the same charges and put him through another trial. He was again convicted. This time Bill and his lawyer appealed the conviction for the reason that the second trial for the same crime was barred/prohibited by the double jeopardy clause.

If you were a Judge of the Supreme Court, what would you decide? Does the double jeopardy clause of the Bill of Rights prohibit the county attorney from prosecuting Bill the second time?

2. Dorothy was charged and tried for receiving stolen property. The prosecutor said that she knowingly purchased stolen stereo and television equipment to resell in her second-hand store. After deliberating for 4 days the jurors could not agree.

Seven of them thought Dorothy was guilty, but five believed she was not guilty. Since it seemed futile to continue jury deliberations the judge dismissed the jurors and declared a mistrial because of the 'hung jury.' The prosecutor, unwilling to give up, had a second jury impaneled to hear the case. This time Dorothy was convicted. She appealed to the state's highest court, claiming that her Fifth Amendment right not to be twice put in jeopardy of life or limb for the same offense had been violated.

How would you decide Dorothy's case? Should she be set free or should the second jury's conviction be affirmed?

3. Bart, his brother, and a cousin were indicted and tried for first degree murder. The brother and cousin were found guilty, but the jury found Bart not guilty. The brother and cousin successfully appealed their convictions (that is, the appellate court said that something was not right or fair about their first trial and they must be given another trial). All three (Bart included) were retried and found guilty. They have all appealed their second convictions, claiming their Fifth Amendment Double Jeopardy rights were violated.

What do you think? How would you rule? Is Bart's case the same as his cousin and brother?

4. Bobbie Sue was convicted of four counts of burglary (breaking into a school at night to steal sports equipment) and sentenced to a total of 10 years in prison. She appealed and won because she had not been represented by a lawyer at her trial. She was poor and unable to afford one. At her second trial on the same charges she was represented by a lawyer appointed by the court. She was convicted again and the judge sentenced her to twenty-five years in addition to the three years she had already served. She has appealed this second sentence as a violation of the double jeopardy clause of the Fifth Amendment.

What would you do in this situation? Is it fair to increase Bobbie Sue's time in prison the second time around? What about the time she has already served--should that time be subtracted from her new sentence?

5. Milt and three others were charged with robbing, at gunpoint, five poker players at the Johnson's house. Milt was tried first with the robbery of poker player #1, but because the robbers wore balaclavas (ski masks) they were not easy to identify. Milt was acquitted (found not guilty) of this charge because the jury was not convinced beyond a reasonable doubt that Milt was one of the robbers. However, the prosecutor was not easily deterred and within two months Milt was being tried for the robbery of player #2. This time the victims gave more definite identifications of Milt's voice, size, height and actions and testified he was one of the robbers. The jury found Milt guilty and the judge sentenced him to 35 years in prison. Milt has appealed, claiming that the double jeopardy clause prohibits trying him for the same crime twice.

How would you decide this case? Was the robbery of the two poker players at the same time and place one crime? Should Milt serve his prison time or does the Fifth Amendment prohibit the second prosecution?

6. Eugene plead guilty to murder in Georgia in exchange for a sentence to life imprisonment (he wanted to avoid the death penalty). However, since the victim had been kidnapped in Alabama, the body had been found in Georgia, and no one was really sure in which state the murder had taken place, Alabama put Eugene on trial also. He was convicted of murder and sentenced to death. He has appealed to the U.S. Supreme Court.

If you were a U.S. Supreme Court Justice, how would you decide this case? Hasn't Eugene been twice put in jeopardy of life or limb? If so, the second conviction should be reversed, shouldn't it?

7. Victoria ran over Fred with her automobile, killing him. She was tried for first degree murder, but only convicted of second degree murder. On appeal her conviction was reversed because of an error which made her trial unfair. The state retried her and the jury returned a verdict of guilty of first degree murder. Victoria has appealed, claiming a violation of the prohibition against double jeopardy.

How would you decide this case? Should Victoria's conviction for first degree murder be upheld?

ACTIVITY 9-C
"Summary of the Law"

"No person shall...be compelled in any criminal case to be a witness against himself..." Fifth Amendment to the U.S. Constitution.

In 1935 the U.S. Supreme Court interpreted this section of the Fifth Amendment to mean that the police could not introduce into court a confession obtained after the suspect had been tortured. Brown v. Mississippi, 297 U.S. 278 (1935). Until 1963 this right to remain silent applied only to the federal government. In Malloy v. Hogan, 378 U.S. 1 (1964) the Court decided that the right also applied to states through the Fourteenth Amendment.

Then in 1964 the Court decided the case of Escobedo v. Illinois, 378 U.S. 478 (1964). That case stands for the proposition that even if a confession is voluntary (not forced by torture or otherwise) it cannot be admitted into court if it was obtained by police after the defendant was denied a request to consult with an attorney. In 1966 the U.S. Supreme Court decided what is probably the most famous case dealing with the right to remain silent, Miranda v. Arizona, 384 U.S. 436 (1966).

In Miranda, the Court ruled that, before police could begin interrogating people in custody, they must advise those persons that they have the right to remain silent, that anything they say can and will be used against them in court, they have the right to consult with an attorney, and that an attorney will be appointed to represent them if they cannot afford to hire an attorney. Also, the Court mandated that interrogations must cease if suspects indicate a desire to remain silent, and that questioning then must be delayed until the arrival of attorneys to represent suspects who desire them. Finally, the Court stated that "if the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination."

It is important to note that Miranda applies only to the admissibility of statements taken from persons while they are in police custody (usually meaning under arrest). Also, Miranda only excludes statements or evidence found as a result of the statements of defendants not advised of their rights to silence and to counsel. Other evidence which is not obtained as a result of an inadmissible confession may still be used to convict the defendant (e.g., an eyewitness report or fingerprints on a gun).

ACTIVITY 9-C

"Interrogations And Confessions"

Roleplay #1 **Defendant, Tom Thumb, was arrested by Officers Brown & White for robbery. Miranda warnings were given to Thumb.**

Tom Thumb: I wanna talk with my lawyer.

Officer Brown: Okay, Thumb, get in the cruiser. Let's take you down to the station.

All Three are riding in cruiser to police station.

Officer White: Ya know, Brown, there's a grade school for handicapped kids close to here. I sure hope none of those kids find Thumb's loaded pistol. Somebody might be hurt.

Officer Brown: Yeah. Man, some little kid could shoot himself or kill a friend accidentally. It would be nice to know where Thumb threw that pistol so we could pick it up now.

Tom Thumb: Turn the car around. I'll show you where the gun is. I don't wanna hurt no little kids.

Issue To Be Decided By Judges:

Was Tom coerced into telling police about the gun? If so, should the police be forbidden from using the gun as evidence in court?

Roleplay #2 **Defendant, a rape suspect, was arrested in a grocery store. The victim had told police that the suspect had a gun.**

Officer Jones: Okay, hold it right there. You are under arrest for rape.
Suspect: Man, I didn't do anything. So don't shoot me.

Officer Jones: I'm not going to shoot you if you just hold still. But speaking of shooting, where is your gun?

Suspect: Over there. (pointing under next checkout counter). It's on the floor.

Officer Jones: Alright, I have it.

Officer then reads suspect the Miranda warnings and takes him to the jail. (See pp. 37-39 for warnings as they are given by Lincoln Police Department, Lancaster County Sheriff's Office, and the Nebraska State Patrol. You may want to find out if your local police or sheriff use similar forms).

Issue For Judges To Decide: Since police questioned (interrogated) suspect while under arrest but before giving the Miranda warnings should the gun be inadmissible as evidence at suspect's trial?

Roleplay #3 **Husband has been arrested for the murder of his son and is at the police station. Wife is also at police station for questioning.**

Officer Smith: (Reads Miranda warnings - see pp. 37-39 for samples) Do you want to talk?

Husband: No. I want to see my lawyer first.

Officer Smith: Okay. No more questions. But your wife is begging to talk with you. While she does I'm going to be right here with you and am going to tape record your conversation. Bring in his wife.

Wife: Why did you hurt him? He wasn't such a bad boy.

Husband: I didn't mean to kill him. I was only trying to scare him.

Wife: Oh, Lord, what will we do?

These statements by Husband were part of the evidence used to convict Husband of murder. He is now appealing the conviction.

Issue For Judges To Decide: Was the conversation between Husband and Wife improper interrogation? If so, should the police be forbidden from using the statements by Husband to convict him?

SAMPLE MIRANDA WARNINGS

MIRANDA WARNINGS

1. You have the right to remain silent.
2. Anything you say can, and may be used against you in court.
3. You have the right to talk to a lawyer before answering any questions, and to have the lawyer with you during questioning.
4. If you want a lawyer, and cannot afford a lawyer, one will be provided for you, free of cost, before any questioning.
5. You can stop the questioning at any time.

Nebraska Law Enforcement Training Center
Grand Island, Nebraska 68801

WAIVER

1. Do you understand your rights, as I have explained them?
2. Are you willing to talk with us without consulting a lawyer, or having a lawyer here with you?

INSTRUCTIONS

1. **READ** all 5 warnings to the suspect, reading from this card.
2. Obtain both waivers, clearly and expressly, before interrogating the suspect.
3. If, at any time, the suspect wants a lawyer, or no longer desires to answer questions, the interrogation must stop.
4. If the suspect asks you to further explain his rights, set out your conversation with him in your report.
5. As always, be just and fair in your judgments in the waivers.

WARNINGS

1. I would like to advise you that I am a police officer. Do you understand that?
2. You have a right to remain silent and not make any statements or answer any of my questions. Do you understand that?
3. Anything you say can be and will be used against you in a court of law. Do you understand that?
4. You have the right to talk to a lawyer and have him present with you during the questioning. Do you understand that?
5. If you cannot afford a lawyer, you have the right to have a lawyer appointed for you prior to questioning at no expense or costs to you.
6. Do you willingly do without the services of a lawyer at this time?
7. Knowing your rights in this matter are you willing to answer some questions or make a statement to me now?
8. Is this statement given freely and voluntarily and without any threats or promises and is it true to the best of your knowledge?

BEST COPY AVAILABLE

MIRANDA WAIVER

Q. I would like to advise you that I am a Police Officer. Do you understand that?

A.

Q. You have a right to remain silent and not make any statements or answer any of my questions. Do you understand that?

A.

Q. Anything that you may say can be used against you in court. Do you understand that?

A.

Q. You have the right to consult with a lawyer and have the lawyer with you during the questioning. Do you understand that?

A.

Q. If you cannot afford a lawyer, the court will appoint one to represent you. Do you fully understand that?

A.

Q. Knowing your rights in this matter, are you willing to make a statement to me now?

A.

Q. Do you willingly waive and do without the services of an attorney at this time?

A.

____
Witness

____
Signature

____
Witness

____
Date

____
Time

We the People

THE BILL OF RIGHTS:

A Law-Related Curriculum for High School Students

Lesson 10:
The Sixth Amendment--
"Equal Justice Under Law"

Written by

Steve Jenkins
Resource Center for Law-Related Education
Bar Association of Metropolitan St. Louis

Wayne Kunz
Law, Youth & Citizenship
New York State Bar Association

Alan H. Frank
University of Nebraska
College of Law

A project of
The Bill of Rights in Nebraska

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Funding for this project is provided by a grant from the Nebraska Committee for the Humanities, an affiliate of the National Endowment for the Humanities and grants from the Cooper Foundation, the Walter Scott Jr. Foundation, the Robert Veach Foundation, and the Winthrop and Frances Lane Foundation.

We the People

Table of Contents

Lesson Ten: The Sixth Amendment--"Equal Justice Under Law"

Introduction 6
Goals 7
Objectives 7
Media Resources 8
Teaching Instructions 11
  Activity 10-A: Sixth Amendment Rights 12
  Activity 10-B: The Presumption of Innocence 13
  Activity 10-C: The Adversary System 14
  Activity 10-D: The Right to an Impartial Jury 15
  Activity 10-E: The Right of Confrontation 16
  Activity 10-F: The Right of Assistance to Counsel 19
  Activity 10-G: Mock Trial 21
Student Materials 26
  Activity 10-A: Sixth Amendment Rights 27
  Activity 10-B: The Presumption of Innocence 28
  Activity 10-C: The Adversary System 29
  Activity 10-D: "By an Impartial Jury of the State and District Wherein the Crime Shall Have Been Committed" 30
  Activity 10-E: "To Be Confronted with the Witnesses Against Him" 31
  Activity 10-F: "And to Have Assistance of Counsel for His Defense" 33
  Activity 10-G: Mock Trial 34

BILL OF RIGHTS

CURRICULUM EVALUATION

HIGH SCHOOL

Teacher ______________________

School ______________________

Grade ______________________

Lesson taught ______________________

A. Please rate your degree of agreement/disagreement with the following statements:

	Totally Agree			**Totally Agree**	
1) The lesson was well suited to my students' conceptual level.	1	2	3	4	5
2) The lesson provided new information.	1	2	3	4	5
3) The lesson presented concepts and information in a better manner than do traditional texts.	1	2	3	4	5
4) The lesson meshed well with our course outline for the semester	1	2	3	4	5
5) I personally learned something from the lesson.	1	2	3	4	5
6) The materials were complete enough for good presentation.	1	2	3	4	5
7) I feel the lesson will be thought provoking for students (stimulate out of class thought & discussion).	1	2	3	4	5
8) I can pick up on the lesson in subsequent classes.	1	2	3	4	5
9) I think the lesson challenged some students' attitudes.	1	2	3	4	5
10) The lesson incorporated, built upon material we have already covered.	1	2	3	4	5
11) I was able to use the lesson *as is*.	1	2	3	4	5
12) I *adapted* the lesson in my presentation.	1	2	3	4	5
13) I would consider using more such materials in my classes.	1	2	3	4	5
14) I feel the materials are deficient in some way.	1	2	3	4	5

Please respond to the questions on the next page also.

Mail completed form to:
Alan Frank, University of Nebraska, College of Law, Lincoln, NE 68583-0902

B. Please answer the following:

1) Describe students' reaction/participation to this lesson:

2) What do you consider the best point of this lesson/activity?

3) What suggestions do you have for adapting or modifying this lesson/activity?

4) Were the materials adequate? How could they be improved?

Lesson 10
THE SIXTH AMENDMENT--
"EQUAL JUSTICE UNDER LAW"

We the People

INTRODUCTION

"Equal Justice Under Law" are the words carved deep into the stone above the entrance to the Supreme Court of the United States. This phrase reflects the primary purpose of law in the United States: to ensure that every person living in this country has the freedom and security to enjoy the benefit of life in a democratic society.

The guarantees of the Sixth Amendment to the United States Constitution play an integral role in assuring "equal justice under law." Together with the Fourth, Fifth, and Eighth Amendments, the Sixth Amendment protects the rights of an individual suspected or accused of a crime to procedural safeguards against the abuse of the awesome power of the state. The Bill of Rights guarantees these rights, in part, to avoid convicting innocent people, but, more importantly, because criminal defendants, even guilty ones, are also citizens. As Justice Douglas observed, "respecting the dignity even of the least worthy citizen...raises the stature of all of us." *Stein v. New York*, 346 U.S. 165 (1952).

Among the Sixth Amendment guarantees is the right to a speedy trial. A **speedy trial,** as the U.S. Supreme Court has explained, is necessary to meet "at least three basic demands of criminal justice in the Anglo-American system: [1] to prevent undue and oppressive incarceration prior to trial, [2] to minimize anxiety and concern accompanying public accusation and [3] to limit the possibilities that long delay will impair the ability of the accused to defend himself." *Smith v. Hooey*, 393 U.S. 374 (1969).

Another Sixth Amendment right is that of a **public trial**. This right, which belongs to the defendant rather than the public (see Lesson 4, Activity 4-C), is "a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." In *re Oliver*, 333 U.S. 257 (1948).

The Sixth Amendment also provides the right to a **jury trial** in "serious" criminal cases — cases that could result in six or more months incarceration. This right prevents oppression by a "corrupt or overzealous prosecutor" or a "biased...or eccentric judge." *Duncan v. Louisiana*, 391 U.S. 147 (1968). Juries also serve as checks against unpopular laws or prosecutions. A jury can always refuse to convict a defendant, even if the evidence against the accused is strong, if the jury believes the prosecution was unwarranted. The Sixth Amendment insists that the jury be impartial and has been interpreted to require that it be drawn from a "fair cross-section" of the community. *Glasser v. United States*, 315 U.S. 60 (1942). The right to a jury trial is covered in Activity 10-D.

Additionally, the Sixth Amendment says that those accused of a crime must be adequately **informed of the charges against them.** They also have the right to **confront the witnesses against them,** which includes the right to be present in the courtroom and the right to cross-examine (ask questions of) the witnesses against them. This provision, called the "confrontation clause," is examined in Activity 10-E. Defendants are also guaranteed the right to **obtain witnesses on their own behalf.**

Finally, the Sixth Amendment provides for the right to **legal counsel** in criminal cases. This means not only that defendants have the right to hire an attorney to represent them in court, but also that the state must supply an attorney at its expense to those who cannot afford one if their criminal trials could result in incarceration. This is because "in our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him." *Gideon v. Wainwright*, 372 U.S. 335 (1963). The right to counsel is covered in Activities 10-F and 10-G.

GOALS

1. To understand the importance of guaranteeing basic rights to persons accused of crimes.
2. To know and understand the constitutional rights provided by the Sixth Amendment.

OBJECTIVES

As a result of this lesson, students will be able to:

1. Identify the constitutional rights provided by the Sixth Amendment *(Activity 10-A).*
2. Comprehend the legal concept of "presumption of innocence" as it applies to the American system of justice *(Activity 10-B).*
3. Analyze the adversarial system of justice as a method of securing the rights of the individual while ensuring justice *(Activity 10-C).*
4. Analyze the right of defendants to a trial before an impartial and fairly-selected jury *(Activity 10-D).*
5. Analyze the right of defendants to be confronted with the witnesses against them *(Activity 10-E).*
6. Analyze the right of defendants to the assistance of legal counsel for their defense *(Activities 10-F and 10-G).*

ACTIVITIES

	Teaching Instructions	Student Materials
Activity 10-A. Sixth Amendment Rights		
Activity 10-B. The Presumption of Innocence		
Activity 10-C. The Adversary System		
Activity 10-D. The Right to an Impartial Jury		
Activity 10-E. The Right of Confrontation		
Activity 10-F. The Right of Assistance of Counsel		
Activity 10-G. Mock Trial (enrichment)		

MEDIA RESOURCES

THE STORY OF A TRIAL

Using a case involving two young men accused of a misdemeanor, the film provides an introduction to procedures that protect citizens' rights and the constitutional safeguards of the accused. From *Bill of Rights in Action* series, BFA Educational Media, 1976, 21 minutes, color.

JUVENILE LAW

Two brothers — one age 18, the other, 15 — are arrested for a crime. The film shows the contrast between adult criminal procedures and juvenile law, and raises questions about the paternalistic character of juvenile justice and the constitutional issues involved in reforming the juvenile justice system. From the *Bill of Rights in Action* series, BFA Educational Media, 1974, 23 minutes, color.

DUE PROCESS DENIED: THE OX-BOW INCIDENT

An abridgment of the feature film, The Ox-Bow Incident, the movie is set in Nevada in 1885 and shows a posse following three suspected cattle rustlers, capturing them, and lynching them, despite their protests that they were innocent. When the sheriff arrives he reveals that the real culprits have confessed. The stunned men realize the enormity of their own crime and a letter written by one of the victims points out that it is always dangerous to take the law into one's own hands. The film stars Henry Fonda, Dana Andrews, and Anthony Quinn. 1943, 30 minutes, black and white.

INTERROGATION AND COUNSEL

The Fifth and Sixth Amendments are introduced in dramatic situations involving an accused person's privilege against self- incrimination and the right to legal counsel. From *The Bill of Rights* series, Churchill Films, 1967, 21 minutes, color.

JUSTICE, GUARDIAN OF LIBERTY

This program establishes the historical need for protecting the rights of the accused, from the horrors committed in the name of criminal justice in early England — for example, the 17th Century Star Chamber — to the encroachment on the rights of Englishmen in the hated writs of assistance in Colonial America. It then examines, through historical precedent and case law, the many controversies that revolve around the problem of balancing the rights of the accused against the public need for and right to security. For example, the Sixth Amendment guarantees anyone accused of a crime the right to legal counsel. In some cases, that means the very society prosecuting the case must also pay to defend the accused. From *The Constitution Project* series, The Constitution Project and WHYY Television, 1988, videotape, one hour, color.

THE RIGHT TO LEGAL COUNSEL

The 1963 Gideon v. Wainwright decision, requiring that indigent defendants accused of serious crimes must be offered counsel, overruled an earlier decision in Betts v. Brady. When tried with adequate legal representation, the defendant, Gideon, was acquitted. BFA Educational Media, 1968, 15 minutes, color.

RIGHT TO COUNSEL

An inquiry-oriented program designed to involve students in the actual decision-making process of the Supreme Court. This filmstrip dramatizes an actual case involving the right to counsel. The class is invited to interpret the case before hearing the actual Supreme Court verdict. Through actual involvement with the issues, students acquire an awareness of the variable and interpretive nature of the law. From *Constitutional Law In Action* series, New York Times, sound filmstrip, color.

GIDEON V. WAINWRIGHT AND MIRANDA V. ARIZONA

Two decisions that clarified the rights of the accused. Examining the inner workings of the nation's highest court and the evolution of American constitutional law, this filmstrip features a variety of pertinent visuals including photographs, period artwork, and historic documents. Former Attorney General Ramsey Clark introduces the issues contested in each landmark case. The program assesses the impact of each decision and provides insight into the American concept of justice. *Supreme Court Decisions That Changed the Nation* series, Guidance Associates, 1986, sound filmstrip or filmstrip on video, color.

JUSTICE UNDER LAW: THE GIDEON CASE

In the Gideon case, the defendant was tried and convicted without legal counsel. The film shows how Gideon, in prison, communicated with state and federal legislative bodies to obtain legal representation, and how the Bill of Rights and Oliver Wendall Holmes' interpretations guided the Supreme Court decision in the case. From *Our Living Bill of Rights* series, Encyclopedia Britannica Educational Corp., 1966, 22 minutes, color.

GIDEON'S TRUMPET

Henry Fonda stars as Florida convict Clarence Earl Gideon, whose handwritten petition to the Supreme Court in 1962 caused a legal revolution. Unable to afford legal counsel, Gideon had been convicted without the benefit of a court-appointed attorney. Jose Ferrer appears as noted lawyer Abe Fortas, who successfully argues before the Court that Gideon was denied due process as guaranteed by the 14th Amendment. Based on the book by Anthony Lewis, this production also stars John Houseman, Fay Wray, and Sam Jaffe. World Vision Home Video, 1980, 104 minutes, color videotape.

We the People

TEACHING INSTRUCTIONS

Activity 10-A:

Sixth Amendment Rights

Purpose: To familiarize students with the rights guaranteed by the Sixth Amendment.

Student Materials: Amendment VI of the U.S. Constitution, p. 27 or from Lesson 1, Activity 1-C.

Directions: Ask the students to read the Sixth Amendment and to identify at least six rights contained in the Amendment:

-right to a speedy trial;

-right to a public trial;

-right to a trial by an impartial jury;

-right to have the trial in, and the jury selected from, the jurisdiction where the crime was committed;

-right to be informed of the criminal charge against the accused;

-right to confront witnesses;

-right to compel witnesses to appear in favor of the accused;

-right to legal counsel.

Enrichment Activity: Assign the students to find newspaper articles that involve Fifth and/or Sixth Amendment rights. Have them identify each right involved in the article and explain how the right was applied in the particular situation. A bulletin board display can be created from the articles.

Activity 10-B:

The Presumption of Innocence

Purpose: To provide students with an understanding of the "presumption of innocence" as it applies to the American system of justice.

Student Materials: Broom Hilda cartoon, p. 28.

Directions:

1. Assign the students to read and study the Broom Hilda cartoon and to list what constitutional rights, if any, the judge is denying Broom Hilda.

   -right to a public trial by an impartial jury;

   -right to be informed of the nature and cause of the accusation;

   -right to confront opposing witnesses;

   -right to require favorable witnesses to appear in court;

   -right to the assistance of legal counsel.

2. Ask the following questions:

   a. Does the cartoon express a belief in the "presumption of innocence," or is there a "presumption of guilt?"

   b. Can you describe another situation where there is a presumption of guilt? Suggest that the students think of real or fictional examples and encourage them to analyze each situation and identify specific constitutional protections that are being denied.

   Among the examples students might come up with are:

   -lynchings;

   -people taking the law in their own hands such as the Bernard Goetz incident in New York or some Charles Bronson or Clint Eastwood films:

   *-vigilante committees dispensing "frontier justice" such as in **The Ox-Bow Incident.***

   c. Under the American criminal justice system, a person accused of a crime is presumed innocent until he or she is proven guilty beyond a reasonable doubt in a court of law. Why is the presumption of innocence so important to our system of justice?

The presumption of innocence is not explicitly stated in the Constitution. However, it can be traced back to Biblical times. It is evident in the laws of Sparta, Athens, and Rome. In 1895, in Coffin v. U.S., the U.S. Supreme Court declared:

> *The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.*

Activity 10-C:

The Adversary System

Purpose: To provide students with an understanding of how the American ideal of justice is pursued through the adversary system.

Student Materials: "The Adversary System" reading pp. 29-30.

Directions: Assign the class to read the written materials. Then have the class discuss the following questions:

1. How does the adversary system protect the rights of the accused?

2. How does the adversary system insure the finding of "truth"?

3. What other methods of "justice" can you think of that would achieve the goals of protecting the accused while searching for the "truth"?

4. Why are lawyers so important in the adversary system of justice?

*This activity was adapted from **Criminal Justice in America** (1985) and is used with the permission of the Constitutional Rights Foundation.*

Activity 10-D:

The Right to an Impartial Jury

Purpose: To acquaint students with the Sixth Amendment right to a trial before an impartial and fairly-selected jury.

Student Materials: "By an Impartial Jury of the State and District Wherein the Crime Shall Have Been Committed" reading, pp. 31-32.

Directions:

1. Assign the class to read the written material or use it as the basis of a lecture. (Prior to doing this you might want to assess class attitudes on capital punishment and give the students a survey similar to the one on page 32 of the student materials. The students can then compare their own attitudes with those found by the New York survey.)

2. Ask the students to study the survey at the end of the reading and ask them the following questions:

   a. What does the survey tell us?

   b. What is the relevance of the survey for determining whether to allow a death-qualified jury to decide whether the defendant is guilty?

   c. If we have to have separate juries for the guilt-phase and the punishment-phase of the trial, won't death penalty cases become too unwieldy?

   d. Do you believe that if people who adamantly oppose the death penalty, but who can fairly decide whether the defendant is guilty, are automatically eliminated from the guilt-determining phase of the trial in a capital case, the defendant is denied his or her right to a fair trial before an impartial jury?

   e. Entirely apart from the death penalty question, what does the survey tell us about public attitudes toward the Bill of Rights?

3. Explain that in *Lockhart v. McCree*, 476 U.S. 162 (1986), the U.S. Supreme Court said that it was not unconstitutional for a death-qualified jury to decide whether the defendant was guilty in a trial for a capital offense.

In *Lockhart*, the Court said that a death-qualified jury serves the state's legitimate interest in obtaining a single jury to decide both the guilt and sentencing phases of a capital trial. The right to an impartial jury is the right to a jury that will conscientiously find the facts and apply the law to those facts, not the right to a jury in which the various predispositions of individual jurors are balanced against each other. The Court also expressed doubts about the validity of data like the survey on page 32 that purports to show the bias of death-qualified jurors.

The three dissenting justices complained that the majority's decision upheld "a practice that allows the State a special advantage in those prosecutions where the charges are the most serious and the possible punishments, the most severe."

Activity 10-E:

The Right of Confrontation

Purpose: To provide students with an understanding of the confrontation clause, strict scrutiny, and elements of fundamental fairness.

Student Materials: State v. Warford case study and questions, pp. 33-37.

Directions:

1. Ask the students to read the case study and discuss the questions with them.

The answer to *question 2* is unclear from the material presented. The trial court apparently was trying to ensure that relevant evidence reached the jury. However, the state Supreme Court apparently assumed that the trial court was attempting to minimize trauma to the child. Of course, such purposes are not necessarily mutually exclusive.

In response to *question 3*, several points could be noted. First, the defendant was deprived of face-to-face confrontation of his accuser. Second, he did not have an opportunity to communicate with his attorney in order to facilitate cross-examination. Third, neither he nor his attorney was in a position to object to misleading or false testimony by the child.

The point to be emphasized in discussion of *question 5* is that the witness, unlike the defendant, has no constitutional rights at stake. Still, her nervousness about confronting the defendant may be so great that it would lead the court to limit confrontation in order to protect the child. Because of its interest in promoting the healthy socialization of children into productive adults, as well as the public interest in prosecuting criminals, the state may take such a stance. In such an instance, the court is being asked to take into consideration the state's interest in the well-being of the child, but the court would not be balancing conflicting constitutional rights.

That point would be a good lead-in to discussion of the material in the **Comment** following the questions. A good example of an infringement of Fourth Amendment rights (although certainly not the only possible example) would be airport searches. Airport security personnel have no reason to suspect virtually anyone using an airport to be a probable hijacker. Nonetheless, people who use airports are forced to submit to warrantless searches because the public safety demands it. (Public safety is a compelling government interest, but it is not protected by the Bill of Rights. The Bill of Rights protects individual freedoms, not "public" or governmental interests.) However, an airport search using metal detectors is no more intrusive than is necessary to protect public safety. A body search is not used unless there is good reason to believe that a particular individual is carrying a weapon.

2. Follow up the discussion of *Warford* with a general discussion of the requirements for fundamental fairness.

   a. One way that the confrontation clause can be understood is that it fits with the commonsense belief that fairness requires that an accuser "say it to my face." In that regard, the right to confront and cross-examine witnesses fits well with the other due-process rights (e.g., the presumption of innocence; the privilege against self-incrimination) that underlie the adversary system of justice. The use of the colloquial expression, "say it to my face," often helps people to see the significance of the confrontation clause.

b. Ask the students to imagine themselves going to court in some kind of dispute. (Events at school or on television courtroom dramas may provide examples for the discussion, if students do not suggest cases spontaneously.) What do they think would affect whether they felt that they had been treated fairly? What possible events would make them feel that the resolution of the dispute was unfair?

Interestingly, psychological studies show the same factors to be important in determining whether participants believe that they have been treated fairly in many different kinds of disputes. As long as individuals believe that the decision was not rigged in some way (i.e., that the decision-maker was not biased), the major determinant of the perception of fairness is the **procedure used, not the outcome**. Even the losers of a case usually feel that they have been treated fairly, when the procedures used were fair. Four aspects of procedure are most likely to affect perceptions of justice:

i. The most important factor is **voice** — having a say. For this reason, it is significant that the adversary system permits each of the disputants to put his or her best case forward.

ii. Also important is **ethical appropriateness** — politeness and respect for the dignity of the parties. Badgering a witness or making him or her wait a long time to testify would increase the belief that the proceeding was unfair. On the other hand, courtesy — such as a polite tone of voice; use of "Mr." or "Ms.," or "sir" or "ma'am" — usually increases perceptions of fairness.

iii. **Honesty** is the third factor. For example, even if it is legal, when police tell defendants that the officers are there to help them, it is likely to be perceived as dishonest and unfair.

iv. The final factor is **consistency**. People expect that they will be treated just as would any other person in the same circumstance. A rich defendant should not be treated differently from a poor one.

c. Present the above factors to the students, and ask them to discuss whether such factors match their own experience. Can they recall times when they've been in a circumstance when they did not believe that they were treated fairly? Is their experience explained by one of the factors? How do the due-process rights in the Bill of Rights relate to the factors involved in perceptions of fairness?

d. You may wish to remind the class of such factors later when they conduct a mock trial (Activity 10-G).

Comments:

1. In the discussion of *Warford*, students may focus on whether the procedures used would increase the quantity and accuracy of the evidence presented in the case. In other words, some may see the issue as being primarily a question of whether truth will be served by permitting the child to testify on closed-circuit television.

The confrontation clause is unique because the case law sometimes has ignored considerations of fairness involved in "saying it to my face" and instead has focused simply on whether confrontation of witnesses is necessary to insure reliable testimony. This implies that the confrontation of witnesses is important primarily in facilitating cross- examination in order to insure more honest testimony and to provide the defendant with an opportunity to rebut misleading evidence. In other words, the confrontation clause may be intended simply to prevent erroneous convictions. If so, there may be no constitutional bar to presentation of evidence known to be trustworthy, even though it is not presented in face-to-face confrontation of the witness by the defendant.

The U. S. Supreme Court has apparently resolved this issue in its decision in *Coy v. Iowa*, 108 S.Ct. xxx (1988). In accordance with state law, the trial court ordered a one-way screen to be set up in front of the defendant allowing him to see his accusers, but shielding his face from the view of the two 13-year-old girls he allegedly sexually assaulted. The Court found that this procedure violated the confrontation clause even though it in no way interfered with the ability of the defendant to cross-examine his accusers. The essence of the confrontation clause, the Court declared, was "a right to meet face to face all those who appear and give evidence at trial." A witness, the Court believed, "may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts.... It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.' In the former context, even if the lie is told, it will often be told less convincingly." The Court concluded that while the right to confront one's accusers face to face may need to be balanced against other important public policies, no such necessity was demonstrated in this case where there was no finding that these particular witnesses needed special protection.

2. In the 1988 legislative session the Nebraska Unicameral passed L.B. 90 which authorizes, upon "a showing of compelling need," the taking of testimony from child victims or witnesses (age 11 or younger) by either videotaping their testimony prior to trial or by allowing the child to testify outside the courtroom via closed-circuit television. In either event, unless otherwise required by the court, the child must testify in the presence of the prosecuting attorney, the defense attorney, the defendant, and any other person deemed necessary by the court, including the child's parent or guardian. While the legislation is intended to "promote, facilitate, and preserve the testimony of such child victim or child witness in a criminal prosecution to the fullest extent possible consistent with the constitutional right of confrontation guaranteed by the Sixth Amendment of the Constitution of the United States and Article I, section 11, of the Nebraska Constitution," the final word on the constitutionality of any application of its provisions rests with the courts.

Activity 10-F:

The Right of Assistance of Counsel

Purpose: To provide students with an understanding of the importance of the right of assistance of legal counsel in criminal cases.

Student Materials: Gideon v. Wainwright case study and questions, pp. 38-41.

Directions:

1. Ask the students to read the case study and discuss the questions with them.

In response to question 5, among the arguments Gideon's lawyer might make is that the Sixth Amendment's guarantee of the right to the assistance of counsel for one's defense should not depend upon one's ability to pay for a lawyer. A hearing without the right to legal counsel is not a fair hearing; thus Gideon was deprived of due process. Not supplying lawyers for indigent defendants would result in unfair discrimination against criminal defendants who are poor. The right to legal counsel is a fundamental right — one that should apply to the states, through the 14th Amendment's due process clause, as well as to the federal government. Gideon's actual guilt or innocence is irrelevant; he has not been tried by civilized standards, and he cannot be punished until he has been.

Among the arguments the lawyers for the State of Florida might make is that the Sixth Amendment applies only to the federal government and not state governments. It should not be applicable to the states because the states need wide latitude in the administration of their criminal justice systems. It would be too expensive to provide attorneys to all poor people accused of crimes. A ruling for Gideon in this case would mean that hundreds of prison inmates, convicted without the assistance of legal counsel, would be set free.

The answer to question 7 is no — the Gideon decision only applied to cases that involved felonies. In Argersinger v. Hamlin, 407 U.S. 25 (1972), the Supreme Court extended the ruling in Gideon to all criminal cases, however minor, that actually result in imprisonment. Gideon does not apply to misdemeanors that result only in fines.

2. Follow-up the discussion on Gideon with a general discussion on the right to legal counsel by asking the following questions:

a. Do you think court-appointed lawyers are as good as those who are privately paid? Why or why not?

Most attorneys would agree that a defendant with considerable funds can obtain superior legal help, but a point to consider is that the most experienced trial lawyers are public defenders who spend most of their time just on trial work, while the majority of private attorneys actually spend less than 10% of their time in court.

b. Assume a defendant wanted to handle his or her own defense. Would this be allowed? Do you think this is a good idea?

In Faretta v. California, 422 U.S. 806 (1975), the U.S. Supreme Court held that criminal defendants have a constitutional right to defend themselves so long as they voluntarily and intelligently waive the right to counsel. A defendant who proceeds without counsel is required to follow all the normal procedural rules. It is almost always a poor idea for one to handle his or her own defense. Even lawyers are warned against this: "A lawyer who represents himself has a fool for a client." The class might be interested in the following article concerning a prominent Nebraska personality:

article
here

c. Assume a lawyer knows that his or her client is guilty. Would it be right for the lawyer to try to convince the jury that the person is innocent? Why or why not?

A lawyer may feel that his or her client is morally guilty, but legal guilt is determined through the adversary process. Criminal defense counsel are bound by the Canons of Ethics to defend their client zealously and within the bounds of the law. The right to effective assistance of counsel would lose its meaning if lawyers assumed the role of "judge and jury".

Enrichment Exercise: Students might wish to read Anthony Lewis' book on the Gideon case, Gideon's Trumpet (Random House, 1964) or watch the movie adaptation (see Media Resources section, p. 5).

Activity 10-G:

Mock Trial

AN ENRICHMENT ACTIVITY

Purpose: A student-conducted mock trial can be an exciting part of any law-related education unit. A mock trial not only demonstrates the right of due process, but also helps the students develop questioning techniques, critical thinking, and oral advocacy skills.

Student Materials: "Witness Statements in the Trial of Clarence Earl Gideon," pp. 42-44; "Trial Process Quiz," p. 45.

Comments:

1. The witness statements from the Gideon case can be used to conduct a mock re-enactment of Clarence Gideon's re-trial after he won his case in the United States Supreme Court.

2. Space limitation preclude the inclusion of detailed directions on how to conduct mock trials. However, following these comments is information on trial procedures through which you can acquaint your students with the key steps and actors in a criminal trial. The information can be presented to the class in a lecture format. Following the lecture administer the Trial Process Quiz and discuss the results with the class.

Trial Process Quiz Answers

1. M — Defendant
2. J — Closing arguments
3. E — Prosecutor
4. A — Jury
5. G — Evidence
6. C — Opening statement
7. L — Court reporter
8. B — Beyond a reasonable doubt
9. D — Cross examination
10. O — Bailiff
11. K — Witness
12. N — Trial

3. Every year the Nebraska State Bar Association produces a packet of information on conducting mock trials featuring the trial that will be the basis of that year's statewide mock-trial competition. This packet should prove invaluable in helping you conduct a mock trial in your classroom. Your school should receive a packet every year. If you need another copy, contact:

Law-Related Education Director
Nebraska State Bar Association
P.O. Box 81809
Lincoln, NE 68501
402/475-7091

4. Cases from prior years' mock-trial competitions can also be used as the basis for a class mock trial. The 1986-87 problem, *Midland v. Pence*, involves freedom of speech; the 1987-88 problem, *Jefferson and Paine v. Liberty High School*, involves freedom of the press and is reproduced, in part, in Lesson 3, Activity 3-E.

TRIAL PROCEDURES

Courtroom trials represent our adversarial system of justice. Trials are controlled by strict procedures and rules so that each side in a case will have a fair and equal chance to present its case. One of the main responsibilities of a judge is to be sure that the trial procedures are followed closely. The major procedures observed in a criminal court trial are outlined below:

1. Jury Selection

In all criminal jury trials, the first step is to select and impanel a jury to hear the case. This is done through questions posed to prospective jurors by the prosecution and defense. The judge may also take an active role in the process.

2. Opening Statement

After the judge calls the court to order, he or she will ask for the trial to begin with opening statements. The prosecution and defense each make an opening statement to the jury. The opening statement is an outline of the evidence each side intends to present during the trial. The prosecution delivers its opening statement first. The defense attorney usually follows immediately with a statement, but may wait until the beginning of his or her case-in-chief.

3. Presenting Evidence

The prosecution presents its side of the case first. (This is called the prosecution's case-in-chief). It usually consists of introducing certain material objects called exhibits (e.g., a gun), as well as questioning prosecution witnesses. After the prosecution has finished presenting its side, the defense may introduce its exhibits and witnesses. Both exhibits and witnesses' testimony are considered to be trial evidence. Strict rules of evidence must be followed, however, before either is allowed in the trial.

Lawyers conduct *direct examination* when they question their own witnesses. *Cross examination* follows when an opposing lawyer is given a chance to ask the witness questions. Lawyers conduct cross examination to test and find weaknesses in the testimony of their opponents' witnesses. They may also try to put doubts into the minds of the jurors about the believability of their opponents' witnesses.

4. Closing Arguments

After all witnesses have been examined, and all other evidence has been presented, each side makes a closing statement or argument to the jury. The closing argument is an attempt to summarize what has been established or not established during the trial. Closing arguments are also designed to try to persuade the jury. The prosecution delivers the first closing arguments to the jury. The closing argument of the defense ends the evidence phase of the trial.

5. Instructions to the Jurors

Following the closing arguments, the judge gives instructions to the jury. These instructions state the law that applies to the case. The judge also reminds the jurors to base their verdict solely on the evidence admitted during the trial. Since the burden of proof is on the prosecution, the judge will instruct the jurors to find a verdict of guilty only if the state has proved its case beyond a reasonable doubt.

6. Jury Deliberations

After hearing the judge's instructions, the jury leaves the courtroom and re-assembles in a jury room to deliberate, discuss, and decide on a verdict. The jury members first select a foreman who will conduct the deliberations. The jury then reviews the evidence and votes on a verdict. Although the U.S. Supreme Court has ruled that unanimous verdicts of guilty or not guilty are not mandatory in all criminal cases, most states still require them. In Nebraska a unanimous verdict is required to convict a person accused of a crime.

Several votes may be necessary before the jurors arrive at a unanimous verdict. If, after a reasonable time, the jurors are unable to reach a unanimous verdict, they become a "hung jury". The foreman will report this fact to the judge. If the judge is convinced that further jury deliberations are futile, he or she will declare a mistrial. The prosecutor would then have to either request another trial with a new jury, or drop the charges against the defendant. If the jury returns a unanimous verdict of not guilty, the defendant is released. When the jury unanimously decides that the defendant is guilty, a date for a sentencing hearing will be set.

ACTORS IN A TRIAL

Outlined below are the major participants in a trial:

1. Judge

The judge presides over the trial. He or she rules on all motions made by the lawyers on admissibility or testimony or items in evidence, and on the procedures to be followed during the trial. At the end of the trial the judge instructs the jury about the applicable rules of law. In a criminal trial, if the jury reaches a verdict of guilty, the judge or jury then determines the sentence to be given the convicted person. (In Nebraska, the judge determines the punishment.) If the jury reaches a verdict of not guilty, the defendant is discharged.

2. Bailiffs

The bailiffs are usually deputy sheriffs or marshals, or other law enforcement officers. They are responsible for keeping order in the courtroom, escorting the accused in and out of the courtroom, protecting the jury from outside influence, and assisting the court clerk in ceremonial duties such as asking all to rise when the judge enters the court. 3. Court Clerk The court clerk is the main administrative assistant to the judge. He or she keeps minutes of courtroom proceedings, keeps catalogs and custody of exhibits and other items of evidence, prepares all written orders of the court (summons and warrants, for example) as directed by the judge, administers oaths, and calls the jurors for selection.

4. Court Reporter

The court reporter makes a transcript by machine or shorthand of everything that is said in the trial. The court reporter prepares a typewritten transcript of these records for use by the judge and the parties involved in the case.

5. Prosecution Lawyers

The prosecution lawyers are members of the district or county attorney's office, city attorney's office, or state and federal attorney general's office. They represent the complainant — either the people, or the State, or the United States government. They must prove that the accused is guilty of a particular crime beyond a reasonable doubt.

6. Defense Lawyers

The defense lawyers are private attorneys or members of publicly-supported organizations, such as the public defender's office. They must defend the accused by raising reasonable doubts about the prosecution's case and by showing that the state or government does not have enough evidence to convict the defendant. All lawyers are officers of the court. They must, therefore, observe all rules of law and ethics that apply to the presentation of testimony and evidence at a trial, so that a complete and fair trial will take place.

7. Defendant

The defendant is a person accused of a crime. He or she assists the defense lawyers in the proper presentation of his or her case and accepts or appeals the results of the trial.

8. Witnesses
Witnesses are people who know something about the facts to be decided and who are asked under oath to tell the members of the jury what they actually saw and heard about the case.

9. Jurors
The jury is a panel of citizens (usually 12) from the community who meet certain minimum requirements in age and mental capacity. They must decide questions of fact on the basis of the evidence presented in the courtroom and reach a verdict based on those facts. A defendant may waive the right to a jury trial, in which case the judge finds the facts.

The Trial Process Quiz and information on trial procedures were adapted from **Criminal Justice in America** *(1985) and are used with the permission of the Constitutional Rights Foundation.*

We the People

STUDENT MATERIALS

Activity 10-A

Sixth Amendment Rights

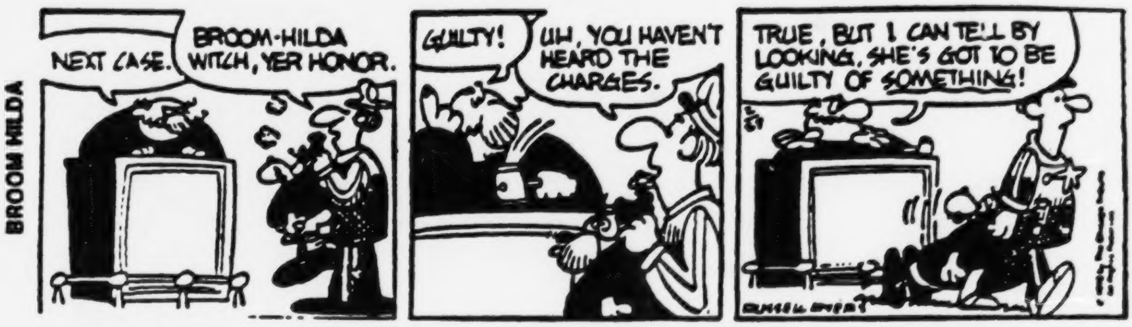
AMENDMENT VI OF THE U.S. CONSTITUTION

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

Activity 10-B

The Presumption of Innocence

Read the following cartoon and list what rights, if any, are being denied in the cartoon.


BROOM HILDA
NEXT CASE.
BROOM-HILDA WITCH, YER HONOR.
GUILTY!
UH, YOU HAVEN'T HEARD THE CHARGES.
TRUE, BUT I CAN TELL BY LOOKING, SHE'S GOT TO BE GUILTY OF SOMETHING!
RUSSELL MYERS

Activity 10-C

The Adversary System

Our system of criminal justice is based on an adversarial process. In it, lawyers representing the prosecution and lawyers representing the defendant help neutral fact-finders (the judge or jury) learn about, sift through, and decide which facts of a particular case are true. Ultimately, the fact-finders must also weigh the facts and come to a verdict.

To do this, the lawyers must be advocates. They are also adversaries. That is, they try to present facts in a light most favorable to their side and point out weaknesses in their opponent's case. Through well-planned strategies and legal arguments, they try to convince the judge or jury to see the "truth" as they do.

The basic goal of the prosecution is to protect society from crime by making sure the guilty are tried, convicted, and punished. By filing charges against a particular defendant, the prosecutor is making a claim that the individual has committed a crime. At trial the prosecutor must prove the claim beyond a reasonable doubt. The basic goal of the defense is to challenge the prosecutor's case by raising all reasonable doubts as to the defendant's guilt. Defense lawyers are also responsible for making sure that the defendant gets every right and benefit guaranteed under law and the Constitution.

By pitting these two sides against one another, it is believed that the truth will come out. For example, if the prosecution's case rests merely on the testimony of an eyewitness who identified the defendant as the one who robbed a liquor store, the defense might go to great lengths to question the memory, eyesight, or motive of the witness. This might be done to challenge the witness' credibility or to present the judge and jury with the defense's viewpoint about what really happened. The defense can be assured of a similar strict examination of any evidence it produces. Under the adversary system, the judge or jury must decide which version is right.

Activity 10-D

"By an Impartial Jury of the State and District Wherein the Crime Shall Have Been Committed"

The Sixth Amendment guarantees those accused of a crime a trial before an *impartial* jury. The U.S. Supreme Court has held that because "the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a 'body truly representative of the community' and not the organ of any special group or class," the jury must be selected from a fair *cross-section* of the community. *Glasser v. United States*, 315 U.S. 60 (1942).

One major issue which has troubled the courts is the selection of the jury for a case in which the death penalty can be imposed. Many states now provide for a two-stage process for capital cases — that is, those punishable by death. In the first stage, the jury determines whether the defendant is guilty. In the second stage, if a guilty verdict has been returned, the same jury decides whether to impose the death penalty. (In Nebraska, however, sentencing is done by the judge, not the jury.)

It used to be that courts routinely dismissed jurors in these cases if the jurors said they were opposed to capital punishment. In 1968, however, the Supreme Court held that this was unconstitutional, commenting, "In its quest for a jury capable of imposing the death penalty the State produced a jury uncommonly willing to condemn a man to die." The Court believed that many people opposed to capital punishment can put aside their viewpoints and decide the case fairly. Only those prospective jurors who stated in advance of the trial that they would not even consider returning a verdict of death could be automatically eliminated, the Court concluded. *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

After Witherspoon, a jury in a capital case would still include only those people who would not refuse to return a verdict of death. This is called a "death-qualified" jury. This jury, in many jurisdictions, will decide not only the punishment phase of the trial, but the guilt-determining phase as well. If the people who were kept off the jury because they would not return a verdict of death could decide the issue of guilt fairly, is it fair to exclude them from the jury for the guilt- determining phase of the trial? Consider the following data:

COMPARISON OF ATTITUDES OF PRO AND ANTI- DEATH PENALTY JURORS IN SUPREME COURT OF KINGS COUNTY, NEW YORK (1976)

Survey Question	Group	Agree	Disagree
If the authorities go to the trouble of bringing someone to trial, he is probably guilty.	Pro Anti	36.7% 19.8%	63.3% 80.2%
Defendants in a criminal case should be required to take the witness stand.	Pro Anti	69.9% 50.8%	30.1% 49.2%
The defendant should prove his innocence or we should at least hear both sides try to prove their case.	Pro Anti	70.9% 57.5%	29.1% 42.5%
A witness who takes the Fifth Amendment (refuses to testify) is probably hiding his guilt of a crime.	Pro Anti	56.9% 45.0%	43.1% 55.0%

Activity 10-E

"To Be Confronted with the Witnesses Against Him"

State v. Warford 223 Neb. 368, 389 N.W.2d 575 (1986)

The Facts

Floyd Warford was charged with first degree sexual assault of a 4 1/2-year-old girl. By the time the case came to trial, the girl was about 5 years old. When she testified, she was asked whether anyone had ever touched her in a bad way. She said yes, and identified Warford as the man who had done so. The child then was given four anatomically correct dolls (dolls that have private parts) and asked to show what had happened. However, after a few responses, she stopped answering the prosecutor's questions. The prosecutor asked her if she could show him what happened if the other people in the courtroom were not there. The child said, "Yes."

The judge then agreed to have the attorneys question the child in a separate room. The jury and the defendant were able to watch her testimony on closed-circuit television in the courtroom, but the defendant was not able to communicate with his attorney. The prosecutor still had difficulty getting the girl to respond to his questions, so the judge decided to let the child's therapist question her. The therapist used many leading questions (improper questions that indicate what the answer should be), but was unable to get much further. So the judge agreed to permit the therapist to question the child with nobody else in the room. Everyone, including the attorneys and the judge, would watch from the courtroom. The defense attorney was unable to object to any of the therapist's questions. After the therapist finished her questions, the defense attorney was able to enter the room the girl was in and ask her questions (cross- examine her).

The jury convicted Warford. The defendant argued on appeal to the Nebraska Supreme Court that his right to confront his accuser was violated by his lack of physical presence during the child's testimony and his inability to object to the questions. He also argued that no special reasons had been given for the special procedures. For example, no one had shown that he would be uncontrollable or would try to intimidate the witness.

The Court's Opinion

In a unanimous opinion, the Nebraska Supreme Court defined its task as determining when the defendant's Sixth Amendment right to confront the witnesses against him could be limited "in order to accommodate the needs and emotional fragility of a child sexual assault victim." The court decided that the trial court had gone too far in limiting confrontation by Warford. Therefore, his conviction was reversed.

The state Supreme Court based its decision on its perception that the prosecution had not demonstrated "a compelling need to protect the child witness from further injury." The court held that use of closed-circuit television to present a child's testimony would violate the confrontation clause unless there was a finding that the particular child would be further traumatized or would be intimidated by testifying in front of the defendant. Even if such a finding were made, the trial court still would have to minimize the intrusion of the procedure on the defendant's rights. "At the very least," the state Supreme Court concluded, "the defendant must at all times have a means of communicating with his attorney, and the court must be able to control the examination by interrupting the questioning to rule on objections." The cameras also would have to be in a position that both the child and the examiner could be seen easily on the screen, as was not always the case in *Warford*.

Questions

1. How did the procedure used in *Warford* differ from a typical trial?

2. What was the reason that such special procedures were used?

3. In what ways did the procedures used in *Warford* affect the defendant's right to confront the witnesses against him?

4. Do you agree with the Nebraska Supreme Court? Did the trial court go too far in trying to protect the child witness? Can you think of any ways the judge could have protected her and enabled her to testify without violating the defendant's right to confrontation?

5. Did the Nebraska Supreme Court adequately consider the rights of the witness?

7. Do you think that the Nebraska Supreme Court's decision was fair? Why or why not?

8. Why is a defendant's right to confront the witnesses against him/her important?

Comment

Sometimes two constitutional rights conflict (for example, a defendant's right to a fair trial and the press's right to report on the trial process). At other times a constitutional right conflicts with another important concern that is not reflected in the Constitution. *Warford* presented such a situation. The defendant's right to confrontation clashed with the public's interest in protecting of the child witness from further trauma and enhancing her ability to tell her story to the jury.

In requiring the prosecution to show that it clearly needed the special procedures that were used in this case, the Nebraska Supreme Court was applying the strict scrutiny test to judge whether the defendant's constitutional rights were violated. Under the strict scrutiny test, whenever the state seeks to infringe on a constitutional right, it must prove three points. First, the state must show that its reason for infringing the right is very important — "compelling." Second, there must be no other way of meeting the state's compelling interest that intrudes less on the constitutional right involved. Third, the plan must be carefully crafted to insure that it will, in fact, serve the state's compelling interest.

For instance, a decision by a trial court that all child witnesses must testify out of the presence of the defendant would probably be found to violate the defendant's Sixth Amendment right to confrontation. By applying the rule to all child witnesses, the state has failed to identify the particular children who would benefit from the procedure (and who would not benefit as much from other alternatives that do not invade constitutionally protected areas). Therefore, there is more intrusion on the constitutional right than necessary. On the other hand, if it could be demonstrated that face-to-face confrontation with the defendant truly was traumatizing for a particular child witness, use of a special procedure like closed-circuit television might be constitutional.

Think about the rights that you have already studied. What are some examples of situations in which constitutional rights might be limited under the principle of strict scrutiny? What are some circumstances in which the Fourth Amendment, for example, might be infringed to protect a compelling state interest? What would be the least intrusive means of protecting such interests?

Activity 10-F

"And to Have Assistance of Counsel for His Defense"

Gideon v. Wainwright 372 U.S. 335 (1963)

The Facts

The Bay Harbor Poolroom in Panama City, Florida, closed down at midnight. The proprietor locked all the doors and windows — carefully, for the neighborhood was a hangout for vagrants, drunks, and petty gamblers. Sometime after dawn, a police officer on a routine patrol discovered that a window of the poolroom had been smashed. Inside, the jukebox and cigarette machine had been broken into, and some beer and wine were missing.

Shortly afterwards, on a tip from a bystander who had "stayed out all night," police arrested Clarence Earl Gideon. Gideon, who lived in a hotel across from the poolroom, was the portrait of a loser: age 51, four times a convict, three times married, drifter, gambler, prematurely white-haired, with a frail, tuberculosis-racked body. Yet the loser refused, this time, to lose. From the outset, Clarence Gideon steadfastly protested his innocence of the charge of "breaking and entering."

At his trial, Gideon asked to have the Florida court provide him with a free lawyer because he did not have enough money to hire his own. To this Judge Robert L. McCrary replied: "Mr. Gideon, I am sorry, but I cannot appoint counsel to represent you in this case. Under the laws of the State of Florida, the only time the court can appoint counsel to represent a defendant is when that person is charged with a capital offense." The charge against Gideon, "breaking and entering with the intent to commit a misdemeanor," was not a capital crime — that is, one punishable by death. Gideon protested, "The United States Supreme Court says I am entitled to be represented by counsel." But his request was denied by the Florida court.

Without a lawyer to represent him, and untrained in law himself, Gideon conducted his own defense about as well as could be expected for a layman. But he was ineffective. He cross- examined the state's main witness, the tipster who said he had seen Gideon inside the poolroom at 5:30 a.m. on the morning it was broken into, but Gideon failed to question the tipster thoroughly about what he himself was doing outside the poolroom at that early hour. Nor did Gideon question the man about his reputation, his occupation, or his recent run-in with Gideon. All of these points would have been explored by a skilled attorney. After cross-examining the other witness for the prosecution, the owner of the poolroom, Gideon presented eight witnesses of his own. But his questioning of these witnesses was so rambling that it produced nothing decisively helpful to his defense. In his final argument to the jury, Gideon simply stressed his innocence.

The jury found Clarence Earl Gideon guilty. The judge sentenced him to five years in state prison. While in prison, Gideon prepared and submitted a five-page "pauper's petition," asking the United States Supreme Court to review his case. Gideon said his conviction violated his Sixth Amendment right to have the assistance of legal counsel for his defense, and it also violated the Due Process Clause of the Fourteenth Amendment. To try a poor man for a felony without providing him with a lawyer, said Gideon, was to deprive him of "due process of law."

The Court Opinion

The U.S. Supreme Court held that the Constitution demands that a person accused of a serious crime should have a lawyer, even if the person cannot afford to pay for the lawyer. The Court felt that without a lawyer an individual cannot be assured a fair trial. As stated by Justice Black in the majority opinion of the Court:

Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyer they can get to prepare their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.

Questions

1. Who was Clarence Earl Gideon? Why was he arrested in Bay Harbor?

2. What did Gideon request from Judge McCrary before his trial? How did the judge respond to his request? What were the reasons for the judge's ruling?

3. What was the result of Gideon's first trial? Do you think he had a fair trial? Why or why not?

4. After being sentenced to prison in Florida, what steps did Gideon take to secure his release?

5. What legal questions did Gideon's case present for the Supreme Court? What arguments could Gideon's lawyer make on his behalf? What arguments could the lawyers for the State of Florida make in support of Gideon's conviction?

6. How did the Supreme Court rule in this case? What reasons did it give for its decision?

7. What was the impact of this decision? Are poor defendants entitled to free legal counsel in all criminal cases?

Activity 10-G

Mock Trial

WITNESS STATEMENTS IN THE TRIAL OF CLARENCE EARL GIDEON

Witnesses For the Prosecution

Statement of Henry Cook

My name is Henry Cook. I am 27 years old, I'm single, and I work part-time as a mechanic at Triple "A" used cars.

On July 8, I, along with four friends, went to Apalachicola to drink at the local bars. When the bars closed at 1:00 a.m. on the morning of July 9, we returned to Bay Harbor. Since I live near the Bay Harbor Poolhall, my friends let me off in front of the poolhall. It was about 2:00 a.m. and I did not feel sleepy, so I just "hung around" the streets enjoying the cool morning breeze. At about 5:30 a.m., I glanced through the front window of the poolhall and saw Clarence Earl Gideon inside of the poolhall bending over the jukebox. Shortly after that, Clarence came out of the poolhall and used a payphone on the corner. At about 5:45 a.m. a taxi picked up Clarence in front of the poolhall and drove him away.

Statement of Sgt. Tony Angelo

My name is Antonio Angelo. I am 37 years old, I'm married, and I am employed by the Bar Harbor Police Department as a police officer.

On the morning of July 9, I was working the graveyard shift. At about 6:00 a.m. I drove by the Bay Harbor Poolroom and noticed that the back door to the poolroom was ajar. Upon further investigation, I noticed that the door had been jimmied open by a flathead screwdriver. When I entered the building, I noticed that the jukebox had been broken into, and that several cases of beer had been torn open.

After my initial investigation of the premises, I went to my patrol car to report the break-in. On my way to the car, I noticed Henry Cook standing by the lamp post. Upon questioning, he stated that he saw Clarence Earl Gideon in the poolhall at 5:30 a.m. With that information, I secured a warrant for the arrest of Clarence Gideon. Mr. Gideon was arrested at his apartment that morning at 10:30 a.m. At the time of the arrest, we found $50 worth of nickels, dimes, and quarters on Mr. Gideon.

Statement of Elenore Riddle

My name is Elenore Riddle. I am 42 years old, I'm married and I work for Sunshine Taxi Company as a cab driver.

On the morning of July 9, at about 5:30 a.m., I received a call from my dispatcher to pick up a fare in front of Bay Harbor Poolhall. Since the poolhall closes at 1:00 a.m., I thought that it was a mighty strange time to be picking up a passenger in front of the poolhall. When I arrived at the poolhall, I picked up Mr. Gideon and drove him across town to Bert's Barber Shop. Mr. Gideon paid his cab fare, $7.75, in small change — nickels, dimes, and quarters.

Witnesses For The Defense

Statement of Ruth Hanover
My name is Ruth Hanover. I am 56 years old, I am a widow, and I own Hanover apartments.

Clarence Earl Gideon is one of my tenants at Hanover apartments. He has lived there for three years and is a good tenant. He always pays his rent on time, and always pays it in cash. I have never received any complaints about him and I just cannot believe that he would steal any money from the poolhall.

Statement of Bill Thurston
My name is Bill Thurston. I am 45 years old, I'm single, and I am the owner of Bay Harbor Poolhall.

On the morning of July 9, I was notified by the Bar Harbor Police Department that someone had broken into my poolhall. After arriving at the poolhall, I took inventory of my stock and discovered that two bottles of wine, a six-pack of beer, and about $35.00 in small change had been stolen.

The police asked me if I knew Clarence Earl Gideon. I told them that Clarence was a regular customer, and that occasionally, when I was out of town, I would hire him as a bartender. In fact, I had given him a key to the poolhall so he could lock-up the place when I was gone.

Statement of Clarence Earl Gideon
My name is Clarence Earl Gideon. I am 51 years old, I'm single, and I am unemployed.

On the morning of July 9, I left my room at Hanover apartments at about 5:30 a.m. and walked across the street to use the payphone in front of the Bay Harbor Poolhall to call for a cab. I did not use the hall phone in the Hanover apartments because it is right outside of Mrs. Hanover's apartment, and I did not want to disturb her. When the taxi arrived, I took it to Bert's Barber Shop. Sometimes I get restless in the early morning hours and I go to Bert's because he is open at 6:00 a.m. and we just sit and talk while he waits for his early morning customers.

At 9:30 a.m. I returned to my apartment. At 10:30 a.m. the police came to my apartment and arrested me for breaking into the Bay Harbor Poolhall. That's the craziest thing I ever heard of. If I wanted to get into the poolhall, I sure wouldn't break down the door. Mr. Thurston gave me a key to the poolhall, why would I break down the door? The police also found money on me when they arrested me. They asked me where I got it, and I told them that I keep small change around so I can play poker. They asked me why I was carrying the change in my pockets and I tried to explain to them that I did not live in a good neighborhood, so every time I went out I took my poker change with me so no one would steal it. I am innocent. I did not break into Mr. Thurston's poolhall.

Activity 10-G

Worksheet

Trial Process Quiz

Directions: From Column B place in the blank the letter for the word or phrase that most closely matches the definition in Column A.

COLUMN A

______ 1. Person accused of a crime

______ 2. Summary of the evidence by both sides

______ 3. Person who represents the government in a criminal trial

______ 4. Trier of fact

______ 5. What each side needs to present to prove their facts

______ 6. Gives an outline of the evidence each side will present during a trial

______ 7. Makes a transcript of the trial

______ 8. The burden of proof in a criminal case

______ 9. Examination of the opposing side's witness

______ 10. Keeps order in the court

______ 11. Person who testifies at the trial

______ 12.Adversary process

COLUMN B

A. Jury

B. Beyond a reasonable doubt

C. Opening statement

D. Cross examination

E. Prosecutor

F. Court clerk

G. Evidence

H. Jury deliberations

I. Judge

J. Closing arguments

K. Witness

L. Court reporter

M. Defendant

N. Trial

O. Bailiff

The Bill of Rights
A Law-Related Curriculum for High School Students

Lesson 11: Protection From Excessive Bail and Cruel & Unusual Punishment

LESSON 11
PROTECTION FROM EXCESSIVE BAIL AND CRUEL AND UNUSUAL PUNISHMENT

INTRODUCTION

Bail is money, property, or bond that is posted by a defendant to secure release from jail while he or she is awaiting trial. The purpose of bail is to assure that the released defendant appears for his or her trial. Bail provides a means for the accused to be free prior to trial to permit "the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction... Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." Stack v. Boyle, 342 U.S. 1 (1951)

To assure the right to bail, the following language was adopted in the Eighth Amendment of the U.S. Constitution, "Excessive bail shall not be required..." But the U.S. Supreme Court has said that such language does not create an absolute right to bail. For example, bail may be denied in capital murder cases to ensure the accuseds' appearance at trial. And provisions of the 1984 Bail Reform Act which allow pretrial detentions without bail have been upheld to insure public safety.

So under what circumstance should we allow bail? And how much is "excessive bail"? This lesson is intended to help you answer those questions and ones related to the prohibition of cruel and unusual punishment.

Many of the early laws governing the colonies addressed the issue of protecting persons, and even animals, from cruel and unusual punishments. The 1641 Massachusetts Body of Liberties stated:

- "No man shall be beaten with above 40 stripes, nor shall any true gentleman, nor any man equal to a gentleman be punished with whipping, unless his crime be very shameful..."
- "For bodily punishments we allow none that are inhumane, barbarous or cruel..."

The 1689 English Bill of Rights provided:

> "That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted."

This protective right was repeated in several of the colonial constitutions written in 1776, in the Northwest Ordinance of 1787, and almost verbatim in 1791 in the Eighth Amendment to the U.S. Constitution:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

But what is "cruel and unusual punishment"? Is the death penalty cruel and unusual punishment if the crime committed is premeditated murder? What if the crime is rape? Would it be cruel and unusual punishment to sentence someone to jail for the "crime" of being addicted to cocaine? How about an alcoholic to jail for public drunkenness? Or a 16-year-old to forty years in prison for possession of nine ounces of marijuana?

This lesson is designed to explore what the U.S. Supreme Court has said about bail and punishment and why, and what our own definitions of "excessive bail" and "cruel and unusual punishments" might be.

GOAL

To understand what is meant by the concepts of excessive bail and cruel and unusual punishment.

OBJECTIVES

As a result of this lesson students will be able to:

1. Comprehend the meaning of "excessive bail" by deciding under which circumstances bail may be denied. (Activity 11-A)
2. Analyze the concept of cruel and unusual punishment by determining what punishments to apply to hypothetical situations. (Activity 11-B)

MEDIA RESOURCES

TEACHING
INSTRUCTIONS

Activity 11-A

Purposes: To acquaint students with the purposes of bail and to have students attempt to reach some conclusions about when bail is excessive.

Student Materials: "Bail Hearing - You Be The Judge", pp._____

Directions:

1. Advise students that you are going to ask them each to decidehow much bail, if any, certain defendants must pay before being let out of jail prior to trial.

2. Write the following chart on the board, or overhead.

	Case Numbers					
Bail Options	1	2	3	4	5	6
(a) release defendant on bail - identify the amount						
-(b) release defendant on his/her personal recognizance						
-(c) grant a conditional release - describe conditions						
-(d) deny release and order defendant held in jail until next court date						

3. Briefly discuss with students the factors usually considered by judges when determining a reasonable bail. Also, discuss the options.

4. Distribute one copy of the student handout to each student.
   a. read through the introductory material on the handout with students.
   b. ask them to read each case carefully.
   c. after reading a case each student should choose which bail option they would apply to the situation and write the letter next to the case number on their paper.
   d. ask the students to summarize in writing their reasons for each case's bail option.

5. Be sure to allow sufficient time for students to indicate choices and reasons in all cases.

6. Use the chart to tally the number of students choosing each option for every case.

7. As they are filling in their charts, or when completed, ask students to discuss their reasons for the options chosen. Be certain to include discussion of why students believe certain options are excessive or not under the circumstances.

During the class discussion the purposes of bail mentioned in the introductory material for this lesson should be included. Those are:

1. to permit the unhampered preparation of a defense to the charge;
2. to prevent infliction of punishment prior to conviction; and
3. to preserve the meaning of the presumption of innocence.

Ask students if they believe these purposes are being served in each case.

Case #1 is based upon State v. Pilgrim, 182 Neb. 594 (1968). The Nebraska Supreme Court held that the right to bail is not absolute under Nebraska's Constitution, Art. I, 9: "All persons shall be bailable by sufficient sureties, except for... murder, where the proof is evident or the presumption great." Defendant was held without bail for nine months prior to trial.

Case #2 is based upon Parker v. Roth, 202 Neb. 850 (1979). Defendant was held without bail until his trial. Art. I, 9 of the Nebraska Constitution states that "All persons shall be bailable by sufficient sureties, except for...sexual offenses involving penetration by force or against the will of the victim...where the proof is evident or the presumption great. The Nebraska Supreme Court held this provision of the Nebraska Constitution valid in Parker. There are three types of crimes in Nebraska for which bail may be denied if the judge is convinced that either the proof is evident or the presumption great. [i.e., that the defendant committed the crime]: murder, treason and sexual offenses involving penetration by force or against the will of the victim. The facts of defendant's background or the circumstances of the crime do not appear in the court's opinion, but are fictional.

In a separate case the Eighth Circuit Court of Appeals ruled the Nebraska Constitutional provision regarding denial of bail for certain sexual offenses unconstitutional. However, the U.S. Supreme Court reversed the Eighth Circuit ruling because the case was 'moot'. Therefore, Nebraska judges may still deny bail to defendant's accused of certain sexual offenses.

Case #3 is based upon Mecom v. United States, 434 U.S. 1340 (1977). The case actually involves an appeal of the amount of bail required pending the appeal of his conviction (bail amounts understandably seem to be higher once the defendant has been convicted). Bail was set at $750,000.

Case #4 is based upon United States v. Archie, 656 F2d 1253 (8th Cir 1981). Bail was set at $35,000 cash or surety. Nebraska law allows the judge to set the bail and require that the defendant pay the full amount in cash or surety - instead of the appearance bond which requires that the defendant post only 10% of the bail amount. Surety means that the defendant could use property (a house, land, an automobile, etc.) of a value equal to the amount of bail in place of cash to guarantee his or her appearance at trial.

Case #5 is based upon State v. Dunnan, 223 Kan. 428, 573 P.2d 1068 (1978). Bail was set at $250,000. Nothing in the opinion indicates whether that is cash or appearance, but that really is not important for our purposes.

What is important to point out to students is that judges have a tremendous amount of discretion in deciding how much and the conditions of bail. Point out to students that bail amounts for the same offenses and types of offenders varies immensely not only from state to state, but also from county to county.

Therefore, it is important for students to discuss the purposes of bail and why the bail they have set in each case serves those purposes. Students need not agree regarding the amount of bail. There is no 'right' answer. Not even the court opinion is necessarily always 'right'. Judges opinions are as different as the student's opinions.

Students should be encouraged to discuss whether they think this difference of opinion is good or bad. What does it mean for the prohibition of 'excessive bail'? How would students change the way the system works?

Perhaps you can arrange to have your local judge come to class to discuss his or her viewpoint regarding bail.

Case #6 is based upon State v. Cardinal, 147 Vt, 461, 520 A.2d 984 (1986). Bail was originally set at $10,000, plus conditions:
1. no felony arrest during time of release; and
2. no contact with the victim.

When defendant was rearrested for violating the court's order (by threatening the victim) bail was reset at $250,000. This amount was reduced by the Vermont Supreme Court to $25,000.

This case compared to case #2 are prime examples of how bail can differ for the same offense.

Activity 11-B

Purpose: To acquaint students with 1) arguments for and against the death penalty and 2) what may or may not constitute cruel & unusual punishment.

Student Materials: "You are Hereby Sentenced To...", pp. ______.

Directions:

1. Ask students to read each hypothetical and the suggested sentences.
2. In groups of 3 to 5, have students select the sentences which they feel are most appropriate and fair - one sentence for each hypothetical.
3. For each case, list the suggested sentences on the board.
4. Conduct a class discussion of the groups' selections, noting them on the board. Be sure to take note of any students' opinions which are in disagreement with the group selection.
5. Some general points of discussion which you should raise with your students:
    a. Whatever sentences students are choosing, they must realize that they are dealing with the beginning of the punishment phase of the criminal justice system.
    b. Students should be asking themselves what the purposes of punishment are. The four most frequently mentioned are retribution, restraint, reformation and deterrence.

Retribution is society getting even with the criminal, paying him or her back for their crimes. Many people argue that retribution is not a proper purpose of punishment for a civilized society. Students should be encouraged to discuss whether they believe each of the purposes of punishment mentioned is appropriate or not, and why.

Restraint is to keep the criminal away from the rest of society to prevent him or her from being able to commit more crimes.

Reformation is to rehabilitate the criminal so that when he or she completes their sentence they will become productive, law-abiding members of society.

Deterrence is said to be both individual and general. Individual deterrence aims at precluding further criminal activity by the particular defendant and the theory of general deterrence is that other potential criminals are persuaded by the sentences they see handed down not to commit crimes.

c. two often conflicting theories of punishment are equality and individualized justice. On the one hand our Anglo-American tradition of equality tells us the criminals who commit similar crimes should be punished similarly. On the other hand, our system adheres to the belief that each person should be sentenced/punished according to their individual transgressions and needs. Finding the proper balance between these two frequently contrasting factors is one of the responsibilities of judges and legislatures.

d. Much of this general discussion should focus on what students believe makes a sentence "fair." What factors should be considered in determining the fairness of a sentence?

6. The following are discussions of the courts' opinions and other background information regarding each hypothetical.

a. Based upon the case of Coker v. Georgia, 433 U.S. 584 (1977). In this case the U.S. Supreme Court expressed the view that (1) the Eighth Amendment barred not only punishments that were barbaric but also those that were excessive in relation to the crime committed, (2) a sentence of death was grossly disproportionate and excessive punishment for the crime of raping an adult woman and was thus forbidden by the Eighth Amendment as cruel and unusual punishment, and (3) although rape was deserving of serious punishment, it did not compare with murder, which involved the unjustified taking of human life.

The important point to impress upon students is that the death penalty is considered cruel and unusual punishment except for the crimes of murder and treason.

b. Based upon the case of Rummel v. Estelle, 445 U.S. 263 (1980). Actually, under the Texas recidivist statute the judge had no choice regarding the sentence once the prosecutor decided to use the statute and the defendant was convicted. Rummel was sentenced to life imprisonment and the U.S. Supreme Court upheld the sentence, saying it was not cruel and unusual punishment.

The major thrust of the court's opinion appears to be that courts should not interfere where the legislature has "drawn the line" regarding when a defendant may be punished with life imprisonment. The court opinion distinguishes death penalty cases because of the total irrevocability of the death penalty. Therefore, in all capital cases, but rarely in other types of cases, the punishment must be proportional to the crime committed.

c. Based upon the case of Solem v. Helm, 463 U.S. 277 (1983). In this case a 5-4 majority of the U.S. Supreme Court reversed the imposition of a life imprisonment sentence. The Court reasoned that this was one of those rare cases where the sentence was significantly disproportionate to the crime, and was therefore prohibited by the Eighth Amendment's prohibition against cruel and unusual punishment.

A major distinction between this case and Rummel is that in Helm the defendant had no chance of ever being paroled.

d. Based upon the case of State v. Stewart, 197 Neb. 497 (1977). Originally, sentenced to death, Stewart's sentence was reduced by the Nebraska Supreme Court to life imprisonment.

If a person is convicted of first degree murder in Nebraska he or she is sentenced by the trial judge or, if the trial judge requests assistance, by a three-judge panel of district court judges. Only in these capitol offense cases is testimony of witnesses and other evidence presented during the sentencing phase of the trial.

Prosecutors present evidence trying to show that certain aggravating circumstances exist which make the death penalty appropriate. Defense attorneys present evidence trying to show that mitigating circumstances exist which negate the propriety of the death penalty. Evidence of aggravating circumstances are limited to those listed in a statute, but defense attorneys are permitted to present evidence regarding any mitigating circumstance even if it is not listed.

For other Nebraska death penalty cases discussed, you may want to provide to students the statutorily listed aggravating and mitigating circumstances. They are

(1) Aggravating Circumstances:
  (a) a previous conviction for murder or any crime involving violence to a person;
  (b) the murder was committed in an apparent attempt to conceal a crime or who committed it;
  (c) a murder for hire or pecuniary gain;
  (d) the murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence;
  (e) at the time of the murder, another murder was committed by the defendant;
  (f) a great risk of death to at least several persons was knowingly created by the defendant;
  (g) the victim was a law enforcement officer who had defendant in custody; or
  (h) the crime was committed to hinder the lawful enforcement of the laws.

(2) Mitigating Circumstances:
  (a) no significant history of prior criminal activity;
  (b) the defendant was acting under unusual pressures or influences or under the domination of another person;
  (c) the crime was committed while the defendant was under the influence of extreme mental or emotional disturbance;
  (d) the age of the defendant at the time of the crime;
  (e) the defendant was an accomplice in the crime committed by another person and his participation was relatively minor;
  (f) the victim was a participant in the defendant's conduct or consented to the act; or
  (g) defendant's ability to appreciate the wrongfulness of his conduct was impaired as a result of mental illness, mental

defect or intoxication.

In Stewart the Nebraska Supreme Court reasoned that only one aggravating circumstance (1b) was applicable to the case and that two of the mitigating circumstances (2a & d) are applicable. Since the Nebraska Supreme Court has held that the death penalty cannot be imposed unless the aggravating circumstances outweigh the mitigating circumstances, Stewart's sentence was reduced to life imprisonment.

e. Based upon the case of State v. Rust, 197 Neb. 528 (1977), decided the same day as the Stewart case. However, in this case the defendant's death sentence for the murder conviction was upheld by the Nebraska Supreme Court. John Rust is one of the 13 inmates currently on Nebraska's death row.

In Rust, the Supreme Court said that the following aggravating and mitigating circumstances existed:

Aggravating:

(1)(a) because of the conviction for assault with intent to do great bodily harm;
(1)(b) because the murder was committed to conceal the robbers' identity;
(1)(f) because the defendant shot at at least three police officers, wounding two of them, and
(1)(h) because the murder was committed in an attempt to avoid capture.

Mitigating:
only (2)(c) because the events of defendant's childhood had contributed to his basic emotional instability and his being trapped and shot at made the crime one of strong emotion and not one of cold calculation.

Since the aggravating circumstances clearly outweigh any mitigating factor and the death penalty under the facts of this case is not excessive, the Supreme Court upholds the death sentence.

f. Based upon the case of Thompson v. Oklahoma, 108 S. Ct. 2687 (1988). Thompson's death sentence was reversed by the U.S. Supreme court, holding that a person under 16 at the time of the crime could not be executed.

The Court noted that the imposition of death on a child under 16 was unusual since only 5 defendants out of 1393 sentenced to death from 1982-1989 were children.

A summary of the Court's reasoning: The cruel and unusual punishment clause is not an unchanging concept to be interpreted only as intended at the time the 8th Amendment was adopted. Instead, what is to be classified as cruel and unusual punishment is to be "guided by the 'evolving standards of decency that mark the progress of a maturing society.'"

Historically in the U.S. anyone over seven years of age could be executed. The Court uncovered 18 to 20 examples of children executed for crimes they committed while less than 16 years of age in the 20th Century alone.

However, today minors are treated differently than adults under the law in a number of ways. Most notable is the establishment of juvenile courts designed to treat youthful offenders differently from their adult counterparts. (The first juvenile court was established in Illinois in 1899). The difference in treatment of juveniles under the law arises from the recognition that juveniles are not prepared to assume the responsibilities of adults. Accordingly, consistency dictates that children should not be held fully responsible for the heinous or aggravating factors in a murder that would otherwise call for the death penalty.

NOTE TO TEACHER: You should point out to students that approximately one year after Thompson the U.S. Supreme Court (in July, 1989) held that a state could execute a minor who was 16 at the time of the crime.

STUDENT
MATERIALS

Activity 11-A

"Bail Hearing - You Be The Judge"

In each of the following hypotheticals you are being asked to choose which one of the four bail options you would use if you were the judge at the bail hearing and to give your reasons for the choices.

Nebraska law requires that any bailable defendant be released from custody, pending a verdict, on his or her personal recognizance (the defendant's personal promise to return to court for trial and the judge's belief in this promise) UNLESS the judge determines that such a release will not reasonably assure the defendant's appearance. If the judge does not believe that the personal promise of the defendant will guarantee his or her return to court, the judge has one or both of the following options:

1) release the defendant on an appearance bond - a specified amount of money that is posted with the court to insure the defendant's return (the defendant needs only to post 10% of the amount of the bond to be released; upon conclusion of the case, if the defendant has returned for all court appearances, 90% of the amount paid in is returned to the defendant; the balance is used to cover the court's costs of processing the bond);

2) grant the defendant a conditional release - for example, releasing the defendant to a third party who promises to make sure the defendant returns to court; or requiring the defendant to report his or her whereabouts during release; or restricting where the defendant may live, travel to, or with whom he or she may associate; or requiring that the defendant return to jail after specified hours.

Nebraska law also allows a judge to decide not to release the defendant if he or she is charged with one of the following three types of crimes:

1. treason;
2. sexual offenses involving penetration by force or against the will of the victim; or
3. murder;

but only if:

1. the proof that the defendant committed the crime appears obvious; or
2. the presumption that the defendant committed the crime is considerable.

In determining which option will reasonably assure the defendant's appearance at all future court proceedings, the judge takes into consideration the following factors, if known:

1. nature and circumstances of the offense charged;
2. defendant's family ties;
3. defendant's employment;
4. defendant's financial resources;
5. defendant's character and mental condition;
6. the length of defendant's residence in the community;
7. the defendant's record of convictions; and
8. the defendant's record of appearance at court proceedings, or of flight to avoid prosecution or of failure to appear at court proceedings.

INSTRUCTIONS: Review the six cases below. Imagine that you are the judge presiding over the initial appearance in each case. Using the factors listed above, choose one or more of the options for each defendant. If you choose bail, remember to indicate the amount. Write down your reasons for each choice.

Case #1 Defendant has been charged with first degree murder, for which the sentence is life imprisonment or death. He is accused of stabbing his wife several times at their farmhouse while she sat at their kitchen table. Defendant informed several persons at the town bar where he was arrested that he had killed his wife because he couldn't stand her any longer. Defendant has prior convictions for bootlegging and breaking and entering. He has been a farmer in the area for seventeen years.

Case #2 Defendant has no prior criminal record. He has been a resident of the area for most of his adult life - he is presently 33 years old. He has been employed as a mechanic at a service station for 3 1/2 years. Defendant is accused of having raped a young woman at knifepoint after following her home from her place of employment. The victim was severely bruised about the face and received four broken ribs as a result of the sexual assault.

Case #3 Defendant has been charged with conspiracy to possess marijuana with intent to distribute. He has no criminal record and has operated a laundromat, a grocery store, and a shrimp boat business in the community for several years. The evidence tends to show that defendant is involved in a large-scale smuggling enterprise from Mexico. His wife, the 'connection' in Mexico, is a fugitive from justice in that county, as is another associate in the enterprise. There is evidence which implicates the defendant in an unsuccessful murder attempt of an associate suspected by the defendant of cooperating with authorities.

Case #4 Defendant is accused of aiding and abetting a robbery by driving the getaway car. Two tellers at the Savings & Loan which was robbed noticed the license number of the car as it was being driven away. A police cruiser followed the car until it was abandoned in the parking lot of an apartment complex. A police officer found the defendant hiding in brush five feet from the parking lot. The defendant, 44 years old, has spent 17 years in various prisons. At the time of the robbery he was on parole for possession of stolen mail. His other prior convictions include forgery, armed robbery and burglary.

Case #5 Defendant is accused of second degree murder and felony theft. Defendant and a friend went from a bar in Wichita, Kansas to defendant's apartment to get something to eat. While defendant was in the kitchen, his friend took a .22 rifle off the wall and fired 3 to 4 shots into the kitchen. The defendant grabbed a .410 shotgun and told the friend to put the rifle down. When he refused, the defendant shot him in the back of the head and took his wallet and automobile. Defendant was arrested two weeks later in Arizona.

Case #6 Defendant is accused of sexual assault. He is a lifelong resident of the state and a husband and a father of four children living in the state.

Activity 11-B

"You Are Hereby Sentenced To..."

INSTRUCTIONS: Read each hypothetical, along with any background information. Discuss the suggested sentences in your small group. Choose one sentence which your group feels is the most appropriate and fair for each hypothetical.

Your group decision does not have to be unanimous.

Hypotheticals

a. While serving various sentences for murder, rape, kidnapping, and aggravated assault, Scott escaped from the state prison on September 2, 1974. At approximately 11 o'clock that night, Scott entered the house of Robert and Jane Smith through an unlocked kitchen door. Threatening the couple with a "board," he tied up Mr. Smith in the bathroom, obtained a knife from the kitchen, and took Mr. Smith's money and the keys to the family car. Brandishing the knife and saying "you know what's going to happen to you if you try anything, don't you," Scott then raped Mrs. Smith. Soon thereafter Scott drove away in the Smith car, taking Mrs. Smith with him. Mr. Smith, freeing himself, notified the police, and not long thereafter Scott was apprehended.

Scott has been convicted of, among other crimes, rape. You are the sentencing judge. Your choices of sentences for the rape conviction are:

1) death by electrocution;
2) life imprisonment; or
3) imprisonment for not less than one nor more than 20 years.

b. In 1964 James was convicted of fraudulent use of a credit card to obtain $80 worth of goods or services. Because the amount was greater than $50, the conviction was for a felony.

In 1969 James was convicted of a second felony - passing a forged check in the amount of $28.36. In 1973 James was convicted of a third felony - obtaining $120.75 by false pretenses.

Because James has now been convicted of these felony offenses, you, as the sentencing judge, now have the following choices:

1) sentence James to 2-10 years in prison for the obtaining money under false pretenses conviction; or
2) sentence James under your state's recidivist statute (when a person has been convicted and served prison time for at least 2 felonies, upon the third felony conviction he/she may be sentenced under this statute) which calls for a mandatory life sentence. However, James would be eligible for parole in 12 years.

JUDGE ______________________________: "James, You Are Hereby Sentenced: ______________________________"
(your choice)

Reasons for choice ______________________________

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(c) By 1975 Jane had been convicted of six nonviolent felonies, including 3-third degree burglaries, obtaining money under false pretenses, grand larceny and third offense DWI. All offenses were nonviolent, none were crimes against persons, and alcohol was a contributing factor in each case.

In 1979 Jane was convicted of writing a "no account" check for $100.

You are the sentencing judge. Your choices of sentences are:

1) a maximum of five years' imprisonment and a $5,000 fine for the crime of writing the bad check; or
2) life imprisonment without the possibility of parole under the states' recidivist statute.

JUDGE ______________________________: Jane, You Are Hereby Sentences To: ______________________________"
(your choice)

Reasons for Choice: ______________________________

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(d) In the summer of 1974 Jimi began selling bags of marijuana for two men. Approximately eight months later the two men accused Jimi of not giving them their full portion of the money due for bags sold and of stealing some of the marijuana from each bag Jimi returned unsold. About one month after these accusations Jimi set up a meeting with the two men, supposedly to pay them the money they claimed was due. The true purpose of the meeting, however, was that Jimi planned to kill the two men.

Jimi took a can of gas and a revolver with him to the meeting. He shot both men in the backs of their heads, then set their car on fire to cover up the murder and attempted murder (only one of the men died from the gunshots).

Jimi confessed to the murders. At the time he committed it he was 16 years old, obtained average grades in school, had no prior criminal record, lived with his parents in a stable family environment.

Jimi has been convicted of first-degree murder. You are the sentencing judge. Your choices of sentences are:

1) Death by electrocution: or
2) life imprisonment.

JUDGE ______________________________________; Jimi, You Are Hereby Sentenced To: ______________________________________"
(your choice)

Reasons for choice: ______________________________________
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____
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e. In February of 1975 Harley and two others robbed at gunpoint employees of a Hinky Dinky store. The robbers fled in an automobile. Almost immediately police were alerted and a chase ensued, during which defendant was observed firing at police cruisers, hitting two of them.

The robbers' car became stuck in a snowbank and the robbers fled on foot. One of the robbers was shot and killed by police and the other surrendered. Harley continued the fire fight, during which he shot and killed a civilian who had come to the aid of police. Harley was observed to be shooting into the civilian's body after the civilian had fallen as a result of an earlier shot fired by Harley.

Harley has previously been convicted of assault with intent to do great bodily harm and of grand larceny. The assault conviction arose out of a brutal assault with a tire iron and placing a chain about the victim's neck.

Harley, as a small child, suffered from an eye defect and was rather clumsy. At the age of 5 he lost the sight of one eye completely. As a result, he had difficulty in school and was abused by other children. Harley blamed himself for the deaths of a younger brother and his father. He dropped out of high school in his junior year. He was 23 years old when he committed the murder.

Harley has been convicted of first degree murder. You are the sentencing judge. Your choices of sentences are:

1) death by electrocution; or
2) life imprisonment

JUDGE: ______________________________________: "Harley, You Are Hereby Sentenced To ______________________________________"
(your choice)

Reasons for choice: ______________________________________
____
____
____

f. Mac, 15 years old, was with three older men when they shot Mac's brother-in-law twice, chained his body to a concrete block, and threw him in the river. All four defendants, including Mac, have been convicted of first degree murder in adult criminal court.

You are the sentencing judge. Your choice of sentences are:

1) death by firing squad; or
2) life imprisonment.

JUDGE: ______________________________ "Mac, You Are Hereby Sentenced To: ______________________________
(your choice)

Reasons for choice: ______________________________

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We the People

THE BILL OF RIGHTS:

A Law-Related Curriculum for High School Students

Lesson 12:
Equal Protection

Written by

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We the People

A project of
The Bill of Rights in Nebraska

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Funding for this project is provided by a grant from the Nebraska Committee for the Humanities, an affiliate of the National Endowment for the Humanities and grants from the Cooper Foundation, the Walter Scott Jr. Foundation, the Robert Veach Foundation, and the Winthrop and Frances Lane Foundation.

We the People

TABLE OF CONTENTS

Lesson Twelve: Equal Protection

Introduction 6
Goal 7
Objectives 7
Activities 7
Media Resources 8
Teaching Instructions 11
  Activity 12-A: Discrimination 12
  Activity 12-B: Point/Counter-Point 13
  Activity 12-C: Discrimination — When Is It Legal? 14
  Activity 12-D: Public Schools and Equal Protection: U. S. Supreme Court Precedents 25
Student Materials 28
  Activity 12-B: Point/Counter-Point 29
  Activity 12-C: Discrimination — When Is It Legal? 32
  Activity 12-D: Public Schools and Equal Protection: U.S. Supreme Court Precedents 39

BILL OF RIGHTS

CURRICULUM EVALUATION

HIGH SCHOOL

Teacher ______________________

School ______________________

Grade ______________________

Lesson taught ____________________

A. Please rate your degree of agreement/disagreement with the following statements:

	Totally Agree			Totally Agree	
1) The lesson was well suited to my students' conceptual level.	1	2	3	4	5
2) The lesson provided new information.	1	2	3	4	5
3) The lesson presented concepts and information in a better manner than do traditional texts.	1	2	3	4	5
4) The lesson meshed well with our course outline for the semester	1	2	3	4	5
5) I personally learned something from the lesson.	1	2	3	4	5
6) The materials were complete enough for good presentation.	1	2	3	4	5
7) I feel the lesson will be thought provoking for students (stimulate out of class thought & discussion).	1	2	3	4	5
8) I can pick up on the lesson in subsequent classes.	1	2	3	4	5
9) I think the lesson challenged some students' attitudes.	1	2	3	4	5
10) The lesson incorporated, built upon material we have already covered.	1	2	3	4	5
11) I was able to use the lesson *as is*.	1	2	3	4	5
12) I *adapted* the lesson in my presentation.	1	2	3	4	5
13) I would consider using more such materials in my classes.	1	2	3	4	5
14) I feel the materials are deficient in some way.	1	2	3	4	5

Please respond to the questions on the next page also.

Mail completed form to:
Alan Frank, University of Nebraska, College of Law, Lincoln, NE 68583-0902

B. Please answer the following:

1) Describe students' reaction/participation to this lesson:

2) What do you consider the best point of this lesson/activity?

3) What suggestions do you have for adapting or modifying this lesson/activity?

4) Were the materials adequate? How could they be improved?

Lesson 12
EQUAL PROTECTION

We the People

INTRODUCTION

> **No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.**
>
> *- 14th Amendment, U.S. Constitution*

Does the equal protection clause of the Fourteenth Amendment make it unlawful for government to discriminate among people? The answer is yes and no. Distinctions among groups of people are made every day. Teachers distinguish between students on a regular basis by awarding A's to some and B's to others. Clearly some students are being treated differently than others. However, such distinctions are reasonable ones based on relevant differences in the students' level of effort and achievement. Not all discrimination is bad and not all kinds of governmental discrimination is prohibited by the equal protection clause.

What the equal protection clause does prohibit is the government treating one group of people differently from another group for reasons that have no legitimate basis. For instance, not everyone should be licensed to practice medicine. If the discrimination between who can and cannot practice medicine is based on good and sufficient reasons — like graduating from an accredited medical school and passing tests showing competency — such discrimination does not violate the Fourteenth Amendment. If the discrimination is based on unreasonable grounds — like being a male — it is illegal.

The most invidious type of discrimination is that which is based on race, color, national origin, religion, or sex and which is leveled against groups which have traditionally been disadvantaged by discriminatory practices. The courts make it particularly difficult to demonstrate that discrimination against these groups is based on sufficiently reasonable grounds.

The equal protection clause is covered in much more detail in Activity 12-C in this lesson and in the chapter on Equal Protection in *A Non-Lawyers Guide to the Bill of Rights* prepared by the Bill of Rights in Nebraska project.

In this lesson, Activity 12-A introduces the topic of discrimination, while Activity 12-B provides an historical overview. Activity 12-D looks at school desegregation and examines how courts use prior cases to help them make decisions. The key activity in this lesson is Activity 12-C, which introduces the students to the three tests employed by the courts to analyze equal protection cases. Other issues explored in Activity 12-C include the constitutionality of laws that discriminate on their face, that discriminate as applied, that have a discriminatory effect but not a discriminatory purpose, and that discriminate in favor of rather than against minority groups (affirmative action or reverse discrimination).

GOAL

To understand the meaning and importance of the Fourteenth Amendment's equal protection clause and to assess how the clause applies in specific cases.

OBJECTIVES

As a result of this lesson, students will be able to:

1. Explain how it feels to be treated differently from others (Activity 12-A).
2. Comprehend that equality of opportunity is a cherished goal of our society and that, although we have made great progress toward achieving this goal, we have fallen short of reaching it. (Activity 12-B).
3. Explain the importance of the equal protection clause in protecting persons from unreasonable discrimination by government authorities (Activity 12-C).
4. Recognize that many laws create classes of persons and that such classification may result in unlawful discrimination (Activity 12-C).
5. Analyze how the judiciary determines if government action violates the equal protection clause by studying and applying the "reasonableness" test, the "strict scrutiny" test, and the "intermediate" test to specific cases (Activity 12-C).
6. Apply precedents in the area of school desegregation (Activity 12-D).

ACTIVITIES

		Teaching Instructions	Student Materials
Activity 12-A.	Discrimination	12	missing
Activity 12-B.	Point/Counter-point	13	29
Activity 12-C.	Discrimination When Is It Legal?	14	32
Activity 12-D.	Public Schools and Equal Protection: U.S. Supreme Court Precedents	25	39

MEDIA RESOURCES

EYE OF THE STORM

The famous "blue-eyed, brown-eyed" experiment conducted in a third grade class in a midwestern agricultural community. Attitudes, behavior, and classroom performances were measurably changed as children suffered segregation and discrimination. Xerox Films, 1970, film or video, 25 minutes, color.

THE CIVIL WAR: THE ANGUISH OF EMANCIPATION

The film borrows dialogue from speeches and written records to dramatize Lincoln's personal struggle to ensure the preservation of the Union and uphold the Constitution, while simultaneously striking a blow at slavery. It shows the horror and futility of war as a means to resolve political disputes, and reveals how emancipation was due more to military necessity than moral imperatives. Learning Corporation of America, 1972, 28 minutes, color.

EQUALITY UNDER THE LAW—THE LOST GENERATION OF PRINCE EDWARD COUNTY

In 1959, public schools were closed and white children in Prince Edward County were encouraged to attend segregated schools. The film analyzes the case as a constitutional violation. From *Our Living Bill of Rights* series, Encyclopedia Britannica Educational Corp., 1967, 25 minutes, color.

DE FACTO SEGREGATION

The integration of a school system presents great difficulties. The film shows the cleavages that develop in a community over a school busing plan. These differences of opinion have to do with the costs of busing and the integrity of the neighborhood school, as well as with integration. From *Bill of Rights in Action* series, BFA Educational Media, 22 minutes, color.

THE DRED SCOTT DECISION

The controversial case involving slavery and states' rights, debated as the country headed for the civil war. Examining the inner workings of the nations highest court and the evolution of American constitutional law, this filmstrip features a variety of pertinent visuals including photographs, period artwork, and historic documents. Former Attorney General Ramsey Clark introduces the issues contested in this landmark case. The program assesses the impact of the decision and provides insight into the American concept of justice. From *Supreme Court Decisions That Changed the Nation* series, Guidance Associates, 1986, sound filmstrip or filmstrip on video, color.

PLESSY VS. FERGUSON

The decision that gave legal justification to segregation, invoking the concept of "separate but equal." Examining the inner workings of the nations highest court and the evolution of American constitutional law, this filmstrip features a variety of pertinent visuals including photographs, period artwork, and historic documents. Former Attorney General Ramsey Clark introduces the issues contested in this landmark case. The program assesses the impact of the decision and provides insight into the American concept of justice. From *Supreme Court Decisions That Changed the Nation* series, Guidance Associates, 1986, sound filmstrip or filmstrip on video, color.

BROWN VS BOARD OF EDUCATION

The unanimous overruling of Plessy vs. Ferguson, declaring segregation in public schools unconstitutional. Examining the inner workings of the nations highest court and the evolution of American constitutional law, this filmstrip features a variety of pertinent visuals including photographs, period artwork, and historic documents. Former Attorney General Ramsey Clark introduces the issues contested in this landmark case. The program assesses the impact of the decision and provides insight into the American concept of justice. From *Supreme Court Decisions That Changed the Nation* series, Guidance Associates, 1986, sound filmstrip or filmstrip on video, color.

SIMPLE JUSTICE: THE STORY OF BROWN V. TOPEKA BOARD OF EDUCATION

A four-hour mini-series about the famous 1954 Supreme Court decision outlawing purposeful segregation in public schools. New Images Productions, 1988, four hours, color.

THE TRIAL OF STANDING BEAR

That hand is not the same color as yours, but if you pierce it, I shall feel the pain. The blood will be the same color. We are men, the same God made us.... All I ask is what is mine — my land, my freedom, my dignity as a man. This moving plea for racial tolerance is the very heart of this production dramatizing the landmark 1879 legal case which established for the first time that Indians were recognized as having protection under the U. S. Constitution. The poignant story of the Ponca chief's efforts to lead his starving people back to their homeland, in defiance of a government treaty, roused public indignation and emotion in 1879, altering the government's harsh treatment of the Indian population. Nebraska ETV Network, 1987, videotape, 90 minutes, color.

THE CONSTITUTION AND MILITARY POWER

The film dramatizes the story of a U.S. citizen of Japanese ancestry who tries to avoid detention and relocation during World War II. The film follows his suit through the courts and also summarizes a previous related court decision of 1866, *Ex Parte Milligan*. From *Decision: The Constitution in Action* series, National Educational Television, 1959, 29 minutes, black and white.

KOREMATSU V. UNITED STATES

A docu-drama concerning the constitutional issues involved in the internment of Japanese-Americans during World War II. Past America, Inc., 60 minutes, color.

WOMEN GET THE VOTE

Using historical footage, the film shows the difficult and sometimes violent course of the campaign for women's voting rights leading to triumph in 1920. From the *Twentieth Century* series, CBS, Contemporary Films, 1962, 25 minutes, black and white.

WOMEN'S RIGHTS

A high school girl wants to swim on the boys' team, but is thwarted by state bylaws which prohibit her from doing so. The film shows the unconstitutionality of the bylaws under the Fourteenth Amendment's guarantee of equal protection of the law to all citizens regardless of race or sex. From *Bill of Rights in Action* series, BFA Educational Media, 1974, 22 minutes, color.

SEX DISCRIMINATION: THE FIGHT GOES ON

The history of sex discrimination in America and the legal struggle to ensure equality. This program identifies laws against discrimination and the controversies that have surrounded them. Tracing the movement of women into male dominated professions and the subsequent rise of new forms of discrimination, the filmstrip shows the demands made on the legal system to keep pace. Some of the current issues explored are sexual harassment and comparable worth. From *Current Legal Issues I* series, National Institute for Citizen Education and the Law and Random House, 1984, sound filmstrip, color.

EQUAL OPPORTUNITY

A black factory worker has been promoted over a white, even though the white had seniority. The company feels that it must have blacks in supervisory positions and also wants to make up for past discrimination. The white protests, saying that, in fact, he is the one being discriminated against. The case is argued in depth before an arbitrator. From *Bill of Rights in Action* series, BFA Educational Media, 1969, 22 minutes, color.

THE PURSUIT OF EQUALITY

In this program the changing conceptions of equality and conflicts over its meaning are described. Title VII, the creation of the Equal Opportunity Employment Commission, and affirmative action policies are discussed, as are a number of legal challenges to them. From *This Constitution: A History* series, International University Consortium, 1987, videotape, color.

THIS PRECIOUS HERITAGE: CIVIL RIGHTS IN THE UNITED STATES

Encouraging students to participate in the ongoing effort to realize the ideals set forth in the Bill of Rights, this program surveys the evolution of American concepts of civil liberties. The program begins with an examination of the origins of the Bill of Rights, and then contrasts their ideals with their periodic violation — including slavery, the denial of women's rights, the mistreatment of native Americans, and abridgement of free speech in times of crisis. Anti-Defamation League, sound filmstrip, color.

EQUAL PROTECTION OF THE LAWS

This videotape program raises such questions as: What are some major constitutional issues about the meaning of equal protection of the laws? How should equality under the law be balanced with liberty under the law? From *A Video Project to Increase the Understanding of the United States Constitution for Junior and Senior High School*, Agency for Instructional Technology and Project '87, 1987, 30 minutes, color.

EQUAL OPPORTUNITY

This sound filmstrip features the De Funis case, a major decision regarding equal protection and affirmative action. Students are shown the historical background for this constitutional right, the value conflicts involved, the issue decided by the Supreme Court, the Court's majority and dissenting opinions, and the effect of the Court's decision. From *Our Constitutional Rights: Landmark Supreme Court Decisions* series, New York Times, sound filmstrip, color.

WHAT PRICE EQUALITY?

Americans have been struggling with the issue of equality since the Declaration of Independence. We the People meant something different to the framers of the Constitution from its meaning today — 200 hundred years ago, slaves were property and women were not even mentioned in the Constitution. This program, hosted by Peter Jennings, focuses on Yonkers, N.Y. where, more than a century after the ratification of the Fourteenth Amendment, a federal court ruled that the city and school district violated the Constitution and denied equal protection of the laws by intentionally discriminating against minorities in housing and the schools. Another segment of this program was filmed in San Francisco, where women sued for the right to join the city's all-male fire department. From *We the People* series, American Bar Association, 1987, videotape, 56 minutes, color.

WHOSE CONSTITUTION IS IT? FROM EXCLUSION TO INCLUSION

When the Constitution was written, the Framers permitted the exclusion of major segments of American society — those without property, blacks, women, and Native Americans. This program traces how, over time, those and other excluded groups have been enfolded into the Constitution's protections. From *The Constitution Project* series, The Constitution Project and WHYY Television, 1988, videotape, one hour, color.

We the People

TEACHING
INSTRUCTIONS

Activity 12-A:
Discrimination

Purpose: To enable students to experience discrimination and reflect on the experience.

Student Materials: None.

Directions:

1.Create a classroom situation that raises "equal protection" issues. For example, all brown-eyed students may sit where they wish, but other students must sit in assigned seats; or all students wearing blue must write an essay, other students need not. Ask the students to describe how they felt about being classified and treated differently.

2.As an alternative, show the film, *Eye of the Storm*, which describes the famous "blue-eyed/brown-eyed" experiment conducted in a third grade class in a midwestern agricultural community. See "Media Resources," page 3 of these materials.

Activity 12-B:

Point/Counter-Point

Purpose: To remind students that equality of opportunity is a cherished goal of our society and that, although we have made great progress toward accomplishing this goal, we have fallen short of reaching it.

Student Materials: "Point/Counter-Point" matching exercises, pp. 30-34.

Directions: The object of this activity is to match each event in the **Point** columns with the best corresponding event in the **Counter-Point** columns. Two games are provided. There are many possible ways to conduct the activity. One would be to divide the students into groups and distribute one or more **Point** cards (each with an event from the **Point** column on it) and one or more **Counter-Point** cards (on different color cards) to each student. Each group then tries to match the cards and compares their match to those of other groups'.

There is more than one way that the events can be matched, but overall the *best* matches (at least in the writers' view) are:

Game One		Game Two	
1 - d	4 - f	1 - b	4 - a
2 - b	5 - c	2 - e	5 - c
3 - a	6 - e	3 - f	6 - d

Activity 12-C:

Discrimination - When Is It Legal?

Purpose: To acquaint students with the standards used to decide cases concerning the equal protection clause of the Fourteenth Amendment.

Student Materials: "Discrimination — "When Is It Legal?" text, questions, and worksheet, pp. 35-46.

Directions:

1. Instruct the students to read carefully the text on pages 35-43 and think about the examples used in the reading. The reading is complex and may need careful review in class. Beginning on page 36, the concept of state action is reviewed. This would be an appropriate time to cover Activity 1-E if it has not been covered or to review it if it has.

2. Assign the students to do the exercise "When Does a Law Violate Equal Protection?", pp. 43-45. This exercise can be done in groups, with each group assigned to consider one or two of the laws. A worksheet to assist the students is provided in the student materials at p. 46.

3. Lead a discussion of the students' answers, *encouraging the students to express and support their own viewpoints*. Below are comments on each of the laws.

Law #1

In an effort to reduce the number of persons under the age of 21 illegally purchasing and consuming alcoholic beverages, the state legislature passes a law requiring two distinct driver's licenses — one regular license for persons 21 or older, and a special red trimmed license issued to persons under 21 with the phrase "UNDER 21" stamped in red on the front and back of the license.

a. The law creates the following classifications:

- persons under the age of 21;

- persons 21 years old and older.

b. The purpose of the law is to reduce the number of persons under the age of 21 illegally purchasing and consuming alcoholic beverages.

c. The court would probably use the "reasonableness" test since the classification does not concern sex, race, religion, or national origin and does not involve fundamental freedoms.

d.The complainant will likely be a person under 21 years of age. This person might argue that the specially colored and coded driver's license creates a stigma, a scarlet letter, and as such discriminates unfairly, denying persons under 21 equal protection of the laws.

e. State lawmakers might argue that evidence suggests that many persons under age 21 alter driver's licenses in order to pass for 21 years of age or older. In many instances the alterations are made to enable the person under 21 to engage in certain activities reserved for persons 21 or older (e.g., purchasing and consuming alcoholic beverages, patronizing night clubs). The special red trimmed and stamped license will be much more difficult to alter, and therefore should reduce the number of persons under 21 who acquire alcoholic beverages under false pretenses. In turn, this may decrease the number of alcohol-related accidents and injuries involving persons under 21. (In 1986 the Nebraska Legislature passed a law requiring that the background of the color photographs on the drivers' licenses of minors under 21 be a different color than those on the licenses of drivers over 21.)

f. In applying a "reasonableness" test for age-based classifications, the judge would need to answer the following questions:

-Did the government have a reasonable purpose in enacting the law?

Attempting to reduce the number of persons under 21 who illegally purchase and consume alcoholic beverages is a reasonable purpose and goal for state government.

-Is there some difference between the two classes, created by the law, that makes it reasonable to treat them differently?

Generally the courts would uphold this law based on the reasonable need to treat the two classes differently. It is against the law in Nebraska and many other states for persons under age 21 to purchase and consume alcoholic beverages. Furthermore, it can be argued that persons under 21 who alter their driver's licenses to purchase and consume alcoholic beverages do not handle liquor as well as persons over 21, and many under 21 are often involved in drunk driving accidents. Therefore, there is justification for treating the two classes differently.

Even if this argument cannot be proven, it is clear that there are many things that children are not capable of doing that most adults can do. The difficulty is deciding where to draw the line. Courts have generally upheld the power of states to establish age qualifications for a number of activities, including:

- serving on a jury;
- marrying without parental consent;
- purchasing, possessing, and consuming alcoholic beverages;
- making a contract and drawing a will;
- being employed for wages;
- obtaining a license to operate a motor vehicle;
- attending school;
- being brought before a juvenile court;
- receiving medical care without parental consent;
- using the courts to sue another person.

The age qualification may differ depending on the activity (e.g., a state may require citizens to be age 16 to get a driver's license, age 18 to marry without parental consent, and age 21 to purchase and consume alcoholic beverages). In general, the government action establishing age qualifications is rationalized by the belief that age is roughly related to a person's maturity and ability to handle certain activities.

Law #2

In an effort to protect women from possible job-related injuries, Congress passes a law that includes the following: "No female, federal employee will be allowed to lift more than 25 pounds at any time while on the job."

a. The law creates the following classifications:

- females;
- males.

b. The purpose of the law is to protect females from some job- related injuries.

c. The court would probably use the "intermediate" test since the classification involves sex (gender).

d. The complainant is likely to be a woman who may wish to qualify for a federal job that may require lifting of objects weighing more than 25 pounds. The woman might argue that the law restricting the amount of weight a female federal employee may lift while on the job discriminates against all females and denies them the same employment opportunities as males. Therefore, women may be denied job promotions and advancements. Women may argue that the ability to perform a task should be the major qualification — many, if not most, females are physically capable of repeatedly lifting objects weighing 25 pounds or more.

e.Congress might argue that women, in general, are not as physically strong as men and, therefore, if they attempted to perform traditional male jobs, the women may be more likely to be injured. Paying for on-the-job injuries to women could become very costly. Besides there are many other opportunities, with less physical requirements, for female advancement and promotion. Therefore, Congress is acting to protect women, as well as to decrease the possibility of costly injuries. This protective labor law helps to provide for the "general welfare."

f. In applying the intermediate test for gender-based discrimination, the judge would need to answer the following questions:

- Does the law further an important goal of the government?

Under Section 8 of the Constitution, Congress has the power and duty to "provide for the common defense and general welfare of the United States . . ." The court might consider this protective labor law as meeting Congress' goal of providing for the "general welfare."

- Is the classification established by the law necessary to accomplish the purpose?

Congress' stated purpose with this law is to protect women from possible job-related injuries. A more effective means of protecting men and women from job-related injuries would be to test their physical ability to perform the tasks required in the job. Therefore ability, not gender, should be a major factor.

It should be noted that courts' views have changed in regards to protective labor laws. In 1908, in Muller v. Oregon, 208 U.S. 412 — upholding an Oregon statute that prohibited the employment of females in mechanical establishments, factories, or laundries for more than ten hours a day — the U.S. Supreme Court concluded:

> That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity, continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

> Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. . . . She is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is unnecessary for men, and could not be sustained.

Congress has passed a number of Civil Rights Acts to prohibit certain types of discrimination. For example, Title VII of the 1964 Civil Rights Act specifically prohibits sex discrimination in employment. This federal legislation, along with the equal protection clause, has led to many revisions and, in some cases, elimination, of protective labor laws. For example, in 1971, in *Rosenfeld v. Southern Pacific Company*, 444 F.2d 1219, the U.S. Court of Appeals for the 9th Circuit struck down a protective California law prohibiting women from doing heavy lifting and/or working more than eight hours a day. The court concluded that there is no evidence that the sexual characteristics of the employee are crucial to the successful performance of the job.

Given the more recent *Rosenfeld* precedent and the large number of working women in a variety of occupations requiring physical strength, the courts would probably strike down Law #2.

Law #3

In an effort to reduce the number of illegal aliens entering the United States from Mexico and other Central and South American countries, Congress passes a law requiring all persons of Hispanic ancestry to register with the Department of Immigration and Naturalization and receive an identification card.

a. The law creates the following classifications:

- all persons of Hispanic ancestry;
- all persons not of Hispanic ancestry.

b. The purpose of the law is to reduce the number of illegal aliens entering the United States from Mexico and other Central and South American countries.

c. The court would probably use the "strict scrutiny" test since the classification is based on national origin.

d. The complainant in this case might be any person of Hispanic ancestry. He or she would argue that being singled out and forced to carry an identification card is arbitrary and discriminatory. The law applies to all persons of Hispanic ancestry, even if they are born in the United States or are naturalized citizens. No other ethnic group must carry identification cards.

e. Congress might argue that the law is necessary to reduce the many problems (e.g., employment, health care, crime) created by the hundreds of thousands, maybe millions, of illegal aliens in the United States. In addition, the identification cards will protect those persons legally living in the United States, both citizens and legal aliens, who will have legal identification and thus be above suspicion.

f. In applying the "strict scrutiny" test, the judge would need to answer the following questions:

- **Did the Congress have a compelling national interest or a purpose of overriding public importance in enacting the law?**

Congress has the constitutional power to "provide for the common defense and general welfare of United States." Securing the borders of the United States is certainly a compelling national interest, and evidence indicates that hundreds of illegal aliens cross the southern borders from Mexico into the United States daily. Congressional reports estimate that there are between 3.5 to 6 million illegal aliens residing in the United States today. The national identification card may be one means of controlling the flow of illegal aliens and thus secure the nation's borders. Congress might also suggest that the identification card will promote the "general welfare," because it will reduce the number of illegal aliens that may be taking jobs away from citizens and legal aliens.

-Is the classification established by the law necessary to accomplish the purpose?

The U.S. Supreme Court has looked with suspicion on any government classification that treats persons differently because of race or national origin. It has also held that aliens, even illegal aliens, residing in this country are "persons" entitled to the protection of the Fourteenth Amendment. *Plyler v. Doe*, 457 U.S. 202 (1982)

Students might suggest other ways of accomplishing the goal of securing the nations borders. In November 1986 Congress passed the Immigration Reform and Control Act of 1986 that among other things subjects employers to civil and criminal penalties for hiring illegal aliens. The act establishes an employment verification system that requires employers to examine documents such as passports and birth certificates to determine if a potential employee is an illegal alien, but does not create a new identification card. In *DeCanas v. Bica*, 424 U.S. 351 (1976), the U.S. Supreme Court upheld a California state law that prohibited an employer from knowingly hiring illegal aliens, if such employment would be harmful to lawful resident workers.

Law #4

In order to protect national security and provide for the nation's defense, Congress passes a Selective Service Act requiring that all males upon reaching age 18 must register for the draft.

a. The law creates the following classifications:

- all 18 years old males;
- all 18 year old females, and all other persons not 18 years old.

b. The purpose of the law is to have young men registered with Selective Service in order to protect national security.

c. The court would probably use the "intermediate" test since the classification involves sex (gender).

d. The complainant is likely to be an 18 year old male. This person might argue that this law is unfair because it exempts females from Selective Service registration. Such an exemption is a violation of the equal protection clause.

e. Congress might argue that the Constitution explicitly authorizes Congress "to raise and support armies . . . to make rules for the government and regulation of the land and naval forces . . . to provide for calling for the militia . . . to provide for organizing, arming, and disciplining the militia;" and, of course, "to provide for the common defense." Since the United States armed forces have been predominantly male, this law embodies both Congressional power and military tradition that has proven very effective in the defense of the nation.

f. In applying the "intermediate" test for gender-based discrimination, the judge would need to answer the following questions:

-Does the law further an important goal of government?

This law enables Congress to achieve the goal of providing for "the common defense," etc. Protecting national security, a fundamental principle leading to the formation of a strong central government, is expressed in the Preamble of the Constitution of the United States— "to form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity . . ."

-Is the classification established by the law necessary to accomplish this purpose?

This law is based on the Military Selective Service Act that authorizes the president to require the registration for possible military service of males, but not females. In 1980, President Carter reactivated the registration process for both males and females, but despite President Carter's requested funding for registering both sexes, Congress allocated only those funds necessary for registering men. Three men brought suit claiming that Congress' action created gender-based discrimination that violated the equal protection clause of the Constitution. The case was eventually heard by the U.S. Supreme Court, and in 1981, in *Rostker v. Goldberg*, 453 U.S. 57, the majority of the Court upheld Congress' action to limit draft registration to males. In reaching the decision, the Court examined Congress' intent in taking this action. Congressional debate indicated that Congress was concerned that sexually- mixed units might experience morale problems, that the presence of women in combat roles might dangerously interfere with the willingness of male officials to wage and win necessary wars, that imposing military service obligations on women would wrench children from their mother's care, and that the administrative changes (including housing and bathroom arrangements) needed to accommodate a substantial female presence in the military would far outweigh the benefits. The Court, after considering the Congressional testimony, concluded "men and women . . . are simply not similarly situated for purposes of a draft or registration for a draft."

Law #5

In an effort to prevent fires, a city passes an ordinance requiring the owners of all laundries housed in wooden buildings within the city to get a permit from the city council. Of the 280 requests for a permit that the City Council acts on, 80 are granted and 200 are refused. All of the 200 requests that were not granted are for laundries owned by Chinese; all of the 80 laundries given the permit are owned by non-Chinese.

a. The law creates the following classifications:

- all laundries in wooden buildings;
- all laundries in non-wooden buildings;

and

- all laundries in wooden buildings with permits;
- all laundries in wooden buildings without permits;

or, as applied,

- all laundries in wooden buildings owned by Chinese;
- all laundries in wooden buildings owned by non-Chinese.

b. On its face the purpose of the ordinance is to reduce the incidence of fire in laundries; as applied, it may be to keep Chinese out of the laundry business.

c. Looking at the law as it is written, the court might use the "reasonableness" test since the classification does not concern sex, race, religion, or national origin.

d. The complainant in this case might be a Chinese owner of a laundry in a wooden building who was denied a permit. He or she would argue that because only Chinese were denied permits the law as applied by the city council denied people or Chinese ancestry the right to run their businesses. This is discrimination on the basis of race and national origin for which there is no rational, let alone compelling, state interest.

e. The city council might argue that the ordinance was a ncessary measure in a city composed of a large number of wooden buildings and that it was within the general police powers of the city to pass such an ordinance. The fact that the ordinance affected Chinese more than others is not relevant; as it is written, the ordinance does not discriminate on the basis of national origin.

f. In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the case from which the facts of this problem were taken, the U.S. Supreme Court said the ordinance gave complete discretion to the city council to decide who did or did not get to operate laundries in wooden buildings. Clearly the council applied the ordinance in a way that discriminated on the basis of race and national origin. The proper test would be the compelling state interest test and there is no compelling state interest in discriminating against Chinese laundries.

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between people in similar circumstances, material to their rights, the denial of equal justice is within the prohibition of the Constitution. . . . No reason for (the discrimination) is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified.

Law #6

In an effort to reward veterans for the sacrifice of military service, to ease the transition from military to civilian life, to encourage patriotic service, and to attract loyal and well-disciplined people to civil service occupations, a state legislature passes a law that says that any qualified veteran (a person who was honorably discharged from the United Stetes Armed Forces after at least 90 days of active service, at least one day of which was during wartime) must be considered for appointment to government civil service positions ahead of non-veterans. Over 98% of all veterans in the state are male, only 1.8% are female.

a. The law creates the following classifications:
- veterans
- non-veterans.

b. The purpose of the law is to reward veterans for the sacrifice of military service, to ease the transition from military to civilian life, to encourage patriotic service, and to attract loyal and well-disciplined people to civil service occupations. Although not its purpose, an obvious effect of the law is that it will beneift a far greater number of men than women in obtaining civil service jobs.

c. The court might use the "reasonableness" test since the classification is not based on race, religion, national origin, or sex and does not involve fundamental freedoms. On the other hand, the court ight use the "intermediate" test since the effect of the law is discrimination against women.

d. The complainant in this case might be a female who is not a veteran and who would have gotten a civil service job were it not for this law favoring veterans. She could argue that the law unfairly discriminates against non-veterans because merit and merit alone should be the basis for government employment practices. Furthermore she could argue that the clear *effect* of the law is discrimination against women because there are so many mor male veterans than female veterans, attributable in some measure to a variety of federal laws and policies that have restricted the number of women who could enlist in the United States Armed Forces due, in large part, to the simple fact that women have never been subjected to the military draft. (See Law #4, above.)

e. The state might argue that they have good reasons for giving veterans preferences -- rewarding veterans for the sacrifice of militray service, etc. The law's *effect* on women, the state could argue, is irrelevant. It is merely a by-product of a law that was designed to serve a valid state purpose and not *intended* to discriminate against women.

f. Determining the proper test may be difficult in this case. If the law's effect on women is considered, the appropriate test would be the "intermediate" test as the case involved sex or gender. If its effect on women is not considered, the appropirate test would be the "reasonableness" test.

The U.S. Supreme Court has said that a law is unconstitutional under the Equal Protection clause only if it was passed or administered with a discriminatory *purpose*. The fact that a seemingly neutral law has a disporportionately adverse *effect* upon women or upon a racial minority does not in and of itself make the statute unconstititonal. Disproportionate impact is not irrelevant -- it and other factors can demonstrate that there was a discriminatory intent -- but impact is not the "touchstone" of unconstitutional discrimination.

The Court said that *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), the case on which this problem is based, was not a case like *Yick Wo v. Hopkins* (see Law #5, above) which involved a classification that appeared to be neutral, but was an obvious pretext for racial discrimination. Even though the adverse impact of the veterans' preference rule on women was clear, there was no proof that the state legislature adopted it "because of" rather than merely "in spite of" its adverse effect on women. Thus the case did not involve discrimination on the basis of gender, and therefore the proper test is the "reasonableness " test. Under this test, the judge would need to answer the following questions:

- Did the government have a reasonable purpose in enacting the law?

The purposes set out in the law seem reasonable.

- Is there some difference between the two classes created by the law that makes it reasonable to treat them differently?

In *Feeney* the Court remarked:

> Veterans' hiring preferences represent an awkward -- and, many argue, unfair -- exception to the widely held view that merit and merit alone should prevail in the employment policies of government. After a war, such laws have been enacted virtually without opposition. During peacetime they inevitably have come to be viewed in many quarters as undemocratic and unwise. Absolute and permanent preferences . . . have always been subject to the objection that they give the veteran more than a square deal. But the Fourteenth Amendment "cannot be made a refuge from ill-advised. . . laws. . . . The substantial edge granted to veterans by (this law) may reflect unwise policy (but the wisdom or lack of it of a law is not the concern of the courts.)

Were the Court to consider this a case of sex discrimination it is doubtful that the Court would find the stated legislative goals to be important enough or the absolute preference necessary enough to pass the "intermediate" test.

Law #7

In an effort to reduce racial tension, provide role models for minority students, and remedy prior discrimination against minorities, a school board adopts a rule that states that if it becomes necessary to lay off teachers, those teacher with the most seniority would be retained. However, at no time would there be a greater percentage of minority personnel laid off than the percentage of minority personnel employed at the time of the layoff.

a. The rule creates the following classifications:

- minority personnel;
- non-minority personnel.

b. The purpose of the rule is to reduce racial tensions, provide role models for minority students, and remedy prior discrimination against minorities.

c. The court might use the "strict scrutiny" test since the classification involves race. On the other hand, because the classification does not discriminate against classes that have traditionally been the subject of discrimination, some lesser test might be used.

d. The complainant will likely be a non-minority teacher who was laid off even though he or she had greater seniority than a minority teacher who was not laid off. The teacher might argue that while seniority is a legitimate basis for deciding who is laid off and is a method that is often agreed to in labor contracts, minority status is not. The teacher would claim that he or she is being discriminated against on the basis of race and that there is no compelling reason to do so.

e. The school board might argue that it adopted the policy to assure that there would be a certain percentage of minority teachers at the school and that this was necessary to provide role models for minority students. Besides, had the school not discriminated in its past hiring practices there would have been more minority teachers with seniority. The discrimination here is less serious than many other kinds of racial discrimination because it is for a good purpose and is not applied against groups that have been traditionally discriminated against.

f. This law raises the issue of affirmative action or reverse discrimination. Are eradicating the traces of past discrimination and creating a truly integrated society important enough goals to permit benign discrimination in favor of members of minority groups? Or should the Constitution be truly "color blind" so that race is never a factor that can be taken into consideration?

The Supreme Court is divided on what is the appropriate test to use in reverse discrimination cases. As many as four of the justices have said that eliminating the previous vestiges of past discrimination is a legitimate state objective; when this is the goal of a law, a less exacting standard of review, one similar to the "intermediate" test, is appropriate. The other justices seem to regard the "strict scrutiny" test as the appropriate one, but disagree about how to apply it in affirmative action cases. Assuming the "strict scrutiny" test were applied, the judge would need to answer the following questions:

-Did the school board have a compelling state interest or a purpose of overriding public importance in the adopting the rule?

In *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), the case from which this fact situation is drawn, Justice Powell wrote the plurality opinion, in what was a 5- 4 split decision holding the rule unconstitutional. Powell wrote that the board's interest in providing minority role models for its minority students, as an attempt to alleviate the effects of *societal* discrimination, was not a compelling enough reason to justify the rule. "Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." The Court, he said, has always insisted upon some prior discrimination by the government involved before allowing limited use of racial classifications to remedy such inequities.

However, if the remedy was to correct prior discrimination against minorities by the school district, it may be appropriate to take race into account. In other words, if it could be shown that the school district had discriminated against minority teachers in the past, a program favoring minority teachers would serve a compelling state interest. On the other hand, if the goal of the program was only to provide a role model for minority students, the state interest was not compelling enough to justify favoring minority teachers.

-Is the classification established by the rule necessary to accomplish the purpose?

Justice Powell wrote that where there has been past discrimination, "as part of this nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy." He concluded, however, that the remedy used here — layoffs of non-minority teachers with greater seniority — was not necessary to accomplish the purpose? He said:

> While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive. We therefore hold that, as a means of accomplishing purposes that otherwise may be legitimate, the Board's layoff plan is not sufficiently narrowly tailored. Other, less intrusive means of accomplishing similar purposes — such as the adoption of hiring goals — are available. For these reasons, the Board's selection of layoffs as the means to accomplish even a valid purpose cannot satisfy the demands of the Equal Protection Clause.

In other words, even if the school district had discriminated against minorities in the past, racially-based layoffs were not proper. Other remedies, such as racially- based hiring quotas, might be acceptable, however. Nonetheless, even these are improper if they are not designed to remedy the effects of past discrimination.

Enrichment Exercises:

1. The equal protection clause of the Fourteenth Amendment is not the only tool that government has to promote equality. There are a number of federal and state statutes, as well as local ordinances, that also mandate equal treatment. Unlike the equal protection clause many of these laws and ordinances deal with private conduct as well as government- related activities. Teachers who wish to go beyond constitutional issues in teaching about equality and the law can have the students research some of these laws. They are briefly described in *A Non-Lawyers Guide to the Bill of Rights* prepared by the Bill of Rights in Nebraska Project.

2. Assign the students to locate news stories in newspapers, magazines, radio, and television concerning discrimination. For each news story the student should:

  a. Identify the person, or group of persons, affected by the discrimination.

b. Determine if the discrimination is public (government- related) or private.

c. If the discrimination is public, or government-related, explain the type of test that might be used if the discrimination were challenged in the courts.

d. Suggest how this problem of discrimination could be resolved.

Activity 12-D:

Public Schools and Equal Protection: U.S. Supreme Court Precedents

Purpose: To familiarize students with school desegregation cases and with the role of precedent in deciding cases.

Student Materials: "Public Schools and Equal Protection: U.S. Supreme Court Precedents" text, questions, and worksheet, pp. 47- 55.

Directions:

1. Assign the students to read the text on pages 47-51.

2. Direct the students to answer the questions in the activity "YOUR TURN: Precedents Change . . . But Not Overnight," p. 52, on the worksheet on page 53. Appropriate answers might include the following:

1.

Column I	Column 2
1896—*Plessy v. Ferguson*	Segregation through separate but equal facilities is constitutional.
1899—*Cumming v.Richmond Board of Education*	Providing a public high school for whites, but not for blacks, does not violate the federal Constitution.
1908—*Berea College v. Kentucky*	Laws prohibiting racially integrated schools are constitutional.
1938—*State of Missouri ex rel. Gaines v. Canada*	Providing a public law school for whites but not for blacks is unconstitutional.
1950—*Sweatt v. Painter*	Segregation when the public law school provided for blacks is not equal to that provided for whites is unconstitutional.
1950—*McLaurin v. Oklahoma State Regents for Higher Education*	Segregation of university students by requiring blacks to use separate cafeterias, classrooms,and libraries is unconstitutional.
1954—*Brown v. Board of Education of Topeka, Kansas*	Segregated education is inherently unequal and therefore unconstitutional.

2. The Supreme Court decisions changed from upholding separate but equal (segregated) schools to finding racially segregated education to be inherently unequal. The change was gradual, beginning in about 1938.

3. Assign the students to do the activity, "YOUR TURN: School Segregation — It's Not the Law, But It Is a Fact of Life . . . Applying the *Brown* Precedents," pp. 54-55. Appropriate responses include:

1. a. **Facts:** Segregation had long been illegal in Dayton, but separate schools for blacks and whites existed in fact. (In other words, there was *de facto* segregation — in fact; but not *de jure* segregation — by law.) Segregated schools resulted from segregated neighborhoods. The school system did little to prevent segregation.

b. **Parties:** Dayton Board of Education and a group of black parents and students.

c. **Started Suit:** Black parents and students filed the suit.

d. **Action Desired:** End segregation in Dayton's public schools.

2. **Law Applicable:** The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

3. **Precedent:** *Brown v. Board of Education* decided that separate but equal schools violated the Fourteenth Amendment. *Brown*, however, involved *de jure* segregation, while arguably *Brinkman* involves *de facto* segregation.

4. Some students might believe the *Brown* precedent should be followed and the segregation of Dayton's school found to be unconstitutional. Others might see a reasonable distinction between segregation mandated by law and that which exists independent of any law, and, therefore, argue that the Dayton situation did not violate the equal protection clause.

5. a. Involve other school districts so that racial percentages will be substantially equal.

b. Set up high quality magnet schools that will attract black and white students from throughout the system.

c. Assign students to schools by random drawing.

4.Discuss with the class the Supreme Court's decision in the *Brinkman* case. Do the students agree with the Court's decision? Why or why not?

The lower court found "cumulative violations" of the equal protection clause, based, in part, on the fact that there was substantial racial imbalance in the system, and ordered a district-wide reassignment of pupils. The U. S. Supreme Court overturned this ruling. The Court said, "Dayton is a racially mixed community, and many of its schools are either predominantly white or predominately black. This fact, without more, of course, does not offend the Constitution." It must be shown that the racial imbalance resulted from the actions of the school board that were intended to cause segregation.

You might note that the decision is consistent with the decision in *Personnel Administrator of Massachusetts v. Feeney* (see pp. 21-22 of these materials) in that the Court in both cases said that discriminatory intent must be proved to show a Constitutional violation.

Adapted from Jenkins & Spiegel, Excel in Civics: Lessons In Citizenship (1985), pp. 128-132, with the permission of West Publishing Co.

Enrichment Exercise: Ask the class to think about what precedents currently in force might change in the years to come. Commentators have suggested that recent appointments to the Supreme Court made lead to changes in the Court's interpretation of laws concerning abortion, school prayer, search & seizure, and the exclusionary rule.

We the People

STUDENT MATERIALS

Activity 12-B

Point/Counter-Point

The Declaration of Independence proclaims, "All men are created equal." Equality of opportunity has long been a cherished goal of our country. Although we have often fallen short, we have made great strides toward accomplishing this goal.

American history is filled with positive accomplishments on behalf of equal rights. On the other hand, there are many instances of behaviors and attitudes in which we can take little pride. For instance, it is true that since 1947, when Jackie Robinson joined the Brooklyn Dodgers, black players have come to play a major role in professional and amateur sports nationwide, north and south (**point**). However, it can also be pointed out that blacks have had few opportunities to contribute in sports as head coaches, managers, and front office personnel (**counter- point**). Likewise, it would be inaccurate to point out America's failure to achieve full equality without also noting the great progress that has been made. For instance, while one who is interested in the role of women in American politics can argue that no woman has received a major political party nomination for president (**point**), it should also be noted that recently a major party nominated a woman for vice-president, a woman sits on the U.S. Supreme Court, and women are being elected as senators, representatives, and governors in increasing numbers (**counter- point**).

Below are two "Point/Counter-Point" games. In the "**Point**" columns you will find lists of events in American history, each of which demonstrates something — either positive or negative — about the state of equality in the United States. In the "**Counter-Point**" columns are lists of events that counter those in the first column. Match each "**point**" with the best corresponding "**counter-point**."

Game One

Point

___ 1. America is settled by the downtrodden of the Old World for whom the New World represents opportunity.

___ 2. The Bill of Rights becomes part of the U.S. Constitution in 1791. It guarantees that no person will be denied life, liberty, or property without due process of law.

___ 3. Over the entrance to the Supreme Court are engraved the words "Equal Justice Under Law".

___ 4. After the Civil War the Constitution is amended to outlaw slavery (13th Amend.), guarantee equal protection of the laws (14th Amend.), and guaran- tee the right to vote irrespective of race and color (15th Amend.)

___ 5. In 1886 the Statue of Liberty is dedicated. It comes to stand for the opportunities available to immigrants in this country.

___ 6. In 1920 the 20th Amendment, guaranteeing women the right to vote, is added to the Constitution.

Counter-Point

a. The U.S. Supreme Court decides the Dred Scott case, which says that a slave cannot be a citizen, but is the property of his/her owner.

b. Because American Indians are considered inferior savages, the government steals their land, breaks treaties with them, and drives them from their homes.

c. Congress passes a law preventing Japanese from becoming naturalized American citizens. In 1942 many persons of Japanese descent are removed from their homes and placed in relocation camps.

d. Blacks are brought to the American colonies as slaves.

e. Women are discriminated against in employment, in education, in getting credit. Marriage laws favor husbands over wives.

f. Southern legislatures pass "Jim Crow" laws that segre- gate blacks and whites and make blacks second-class citizens. Through poll taxes, unfairly applied literary and morality tests, and white-only primaries, many blacks are denied the right to vote.

Game Two

Point

___ 1. At the time of the Revolutionary War, many American leaders own slaves.

___ 2. In 1896 the Supreme Court says that a state law which required "separate but equal" railroad facilities for blacks and whites does not violate the equal protection clause.

___ 3. Poll taxes are used in southern states to keep blacks from voting.

___ 4. Many businesses, including restaurants and motels, refuse to let blacks and other minorities use their facilities.

___ 5. The United States is becoming increasingly racially separated, with minority groups concentrated in the cities and the white majority in the suburbs. Discrimination in housing is one of the reasons.

___ 6. The proposed Equal Rights Amendment, that says that "Equality of Rights under the law shall not be denied or abridged by the United States or by any state on account of sex," is not ratified by enough states to become part of the Constitution.

Counter-Point

a. Congress passes the Civil Rights Act of 1964 which prohibits discrimination in restaurants, motels, and other places of public accommodations.

b. The Declaration of Independence declares that "All men are created equal."

c. In 1968 the Supreme Court decides that an 1866 law prohibits all racial discrimination, private and public, in the sale or rental of property; Congress passes the Civil Rights Act of 1968 which forbids a variety of discriminatory housing practices based on race, color, religion, or national origin.

d. Congress passes the Equal Pay Act which requires equal work for equal pay without regard to sex and Title VII of the Civil Rights Act of 1964 which prohibits job discrimination on the basis of sex, race, color, religion, or national origin. In 1971 the Supreme Court rules that sex discrimination violates the equal protection clause of the 14th Amendment.

e. In 1954 the Supreme Court rules that a state law that set up segregated schools is unconstitutional. The Court says, "Separate educational facilities are inherently unequal."

f. The 24th Amendment is added to the Constitution in 1964 It says that the right to vote in federal elections cannot be denied for failure to pay any poll tax or any other tax.

Activity 12-C

Discrimination — When Is It Legal?

Laws — including rules, statutes, and regulations — often create classifications that have the effect of disadvantaging one group or another. For instance, most states have statutes that establish a minimum age qualification for a driver's license — for example, age 16 or 18. Many states prohibit persons under the age of 21 from purchasing or consuming alcoholic beverages. Most states and municipalities have statutes and ordinances that apply only to persons classified as juveniles— for example, ordinances that make a curfew violation or running away an offense. Additionally, some laws establish certain benefits for which only certain groups qualify (e.g., Social Security, Aid to Families with Dependent Children). Many election laws establish special classes — for example, residency, minimum age, and in some cases, special qualifications, like being an attorney in order to be a candidate for judge.

Do any of these laws discriminate? Certainly they do. For example, persons under the age of 16 are discriminated against and are thus denied an opportunity to pass a driver's test in those states where 16 is the minimum age requirement for obtaining a driver's license. The tough question is whether that discrimination is permissible.

The Fourteenth Amendment to the United States Constitution states "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." Do laws that create classifications, like those that discriminate on the basis of age, violate the equal protection clause? May a 15 year-old make a successful claim that the state's 16 year-old age qualification for a driver's license violates the Fourteenth Amendment and, therefore, should be declared unconstitutional?

When conflicts regarding the meaning and application of the Constitution arise, the courts are sometimes asked to resolve such conflicts. The process of interpreting the Constitution is often a difficult task. The issues of discrimination and equal protection have produced some historical confrontations for the U.S. Supreme Court.

In general, when deciding whether a classification violates the equal protection clause, the courts apply a *reasonableness* standard. Thus, the Fourteenth Amendment protects persons from *unreasonable* discrimination by the government.

State Action

As we studied in Lesson 1, the Fourteenth Amendment does not protect a person from private action that discriminates. If a person says, "no left-handed people may come to my party," the Fourteenth Amendment would not protect left-handed persons from this type of discrimination because it is private, not government-related.

However, what if your county government adopted a policy that prohibited left-handed persons from working in any county government job? If a left-handed person seeking a county government job filed a suit claiming that the anti-left-handed policy violated the "equal protection" clause, the court would first determine that the case involved government-related discrimination, and then it would decide if the discrimination were reasonable. In other words, before the Fourteenth Amendment can apply there must be state action. Although the Fourteenth Amendment prohibits "any state" from denying equal protection of the laws, it is clear today that the equal protection clause applies to the federal government as well as state and local governments. It might be useful at this time to review Activity 1-E on state action.

When Is Discrimination Permissible?

If discrimination is government related, the courts may be asked to decide if it is permissible. The courts have developed a series of tests to apply to cases involving government-related discrimination. Three distinct tests are often applied by the U.S. Supreme Court:

- **the reasonableness, or rational basis, test;**
- **the strict scrutiny, or suspect classification, test;**
- **the intermediate, or substantial relationship, test.**

Each test examines, first, the government's purpose in passing the law or enacting a regulation; and second, the relationship between the purpose and the classification created.

The Reasonableness Test

Courts do not desire to overrule other branches of government. Therefore, the courts generally assume that a lawmaking or rulemaking government body has a reasonable purpose in enacting a law. In regard to laws that discriminate, the courts ask two questions:

- **Did the government have a reasonable purpose in enacting the law?**
- **Is there some difference between the two classes of people, created by the law, that makes it reasonable to treat them differently?**

For example, apply the reasonableness test to the following situation:

> *In an effort to promote responsible marriages among mature persons, the state legislature enacts a statute that restricts marriage, without parental consent, to persons 18 or older. Two 16 year-olds want to get married and claim that this statute violates their Fourteenth Amendment right to equal protection.*

Let's apply the test. First, did the state legislature have a reasonable purpose in enacting this law? Yes, its purpose was to restrict marriage to persons who are at least 18 and probably more mature. Second, is there a difference between those 18 and older and those under 18 that makes it reasonable to treat them differently? Yes, statistics show that persons who get married under the age of 18 are more likely to get divorced than those who wait until they are older. Often the divorce involves children born to the young couple. In such cases the state often has to provide assistance for the divorced parent and his or her family. The state definitely has a valid reason for establishing an age limitation — maybe it should be 21 or older.

The Strict Scrutiny Test

In 1944, in the case of *Korematsu v. United States*, 323 U.S. 214, the U.S. Supreme Court said, "all legal restrictions which limit the civil rights of a single racial group are immediately suspect, and the courts must subject them to the most rigid scrutiny." As a result of this and similar cases, the courts examine with "strict scrutiny" any government actions that discriminate against people on the basis of race, religion, or national origin or involve fundamental freedoms such as the right to vote. In examining such actions, the courts ask two questions:

- **Does the state have a compelling state interest or a purpose of overriding public importance in enacting the law?**

- **Is the classification established by the law necessary to accomplish the purpose?**

Apply the strict scrutiny to the situation in *Korematsu*:

> *In early 1942, following the Japanese attack on Pearl Harbor, Hawaii, in December of 1941, the President and Congress took action to protect the West Coast of the United States from Japanese invasion and subversion. Through an executive order, as well as an enforcement law passed by Congress, the United States military ordered all persons of Japanese ancestry, including United States citizens, to relocation camps hundreds of miles from the West Coast. Thousands of Japanese-Americans were forced to give up their homes and property. Any Japanese- American refusing to obey the relocation order was subject to arrest and prosecution.*

Let's apply the test. Does the President and Congress have a purpose of "overriding public importance" in ordering the relocation of Japanese-Americans? The Supreme Court said yes; protecting national security is one of the most important purposes of government. Is the classification (Japanese-Ameri- cans) established by the law necessary to accomplish the purpose? The Court said yes; reports presented by the military claimed that the Pacific Coast might be the target of "possible and probable [Japanese] enemy activities," which could be assisted by enemy agents signaling from the coastline and by sabotage. General DeWitt, Western Defense Commander warned.

> *The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become "Americanized", the racial strains are undiluted.... There are indications that [Japanese-Americans] are organized and ready for concerted action at a favorable opportunity.*

In view of these reports, the U.S. Supreme Court concluded that although the government action singled out the class of Japanese-Americans, such discrimination was necessary to protect national security.

The *Korematsu* case stands alone as the only modern Supreme Court case that has held racial classifications that discriminate against racial minorities to be constitutional under the strict scrutiny test. It also stands as an embarrassing blight on this country's treatment of its citizens and residents. In 1980 a special commission was appointed to review the facts and circum- stances surrounding the internment of Japanese-Americans during the war. In 1982 the commission issued a report, *Personal Justice Denied*, that found that military necessity did not warrant the exclusion and detention of all persons of Japanese ancestry without regard to individual identification of those who may have been potentially disloyal. It concluded that "broad historical causes which shaped these decision were race prejudice, war hysteria and a failure of political leadership." As a result "a grave injustice was done to American citizens and resident aliens of Japanese ancestry." The report added, "Today the decision in *Korematsu* lies overruled in the court of history."

In 1983 Fred Korematsu asked a federal court to overturn his conviction for failure to obey the relocation order. U.S. District Court Judge Marilyn Patel found that government offi- cials knowingly withheld from the courts information that contradicted General DeWitt's assertions concerning the military necessity of the actions taken. She overruled Korematsu's conviction, stating that the Supreme Court's decision in *Korematsu*

> stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antago- nisms our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused.

Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal., 1984).

In 1988 Congress passed legislation that "apologized on behalf of the people of the United States for the evacuation, relocation, and internment" of the Japanese-Americans and authorized a $20,000 payment for each internment camp survivor.

The Intermediate Test

The intermediate test is relatively recent and is used in cases involving government action that may result in sex discrimination. According to this test, classifications by sex are constitutional only if the classifications serve "important governmental objectives," and are substantially related to the achievement of those objectives. In determining if any law that treats people differently because of their sex is constitutional, the courts examine the following questions:

- **Does the law further an important goal of the government?**
- **Is the different treatment of men and women substantially necessary to accomplish this goal?**

If the answer to either of these questions is no, then the law in question is unconstitutional. For example, apply the intermediate test to the following situation:

> *An Oklahoma law prohibited the sale of beer to men under 21 years, but permitted the sale to women 18 or older. The Oklahoma state legislature claimed that this law was enacted to improve traffic safety because it would decrease the number of males between the 18 and 20 years of age who would be arrested for driving while intoxicated.*

Let's apply the test. Does the law further an important goal of the government? Yes, because the state legislature's objective of improving traffic safety is a worthy purpose that promotes safety and the general welfare of the state. Is the different treatment of men and women substantially necessary to accomplish the goal of improved traffic safety? In the case of *Craig v.Boren*, 429 U.S. 190 (1976), the U.S. Supreme Court concluded that these facts did not support the different treatment of men and women to achieve the state's purpose. The Court said that the statistical differences in the behavior of young men and women were too insignificant to justify denying the sale of beer to young men. The Court said other means that did not involve sex discrimination could be used to improve traffic safety — for example, improved education about the dangers of drinking and driving and more vigorous enforcement of drunk-driving laws.

So, how do the courts respond if someone cries, "That's unfair; that's discrimination; that violates my constitutional right to equal protection"? In general, the courts use the following guidelines in cases when government-related action creates classifications that result in discrimination:

- **if the classification involves race, religion, or national origin, or involves fundamental freedoms such as the right to vote, the courts will use the "strict scrutiny" test;**
- **if the classification involves sex, and certain other classifications, the courts will use the "intermediate" test; and**
- **if the classification results in any other group being treated differently, the courts will use the "reasonableness" test.**

When Does a Law Violate Equal Protection?

Read the following laws. For each law:

a. Identify the groups or classes created by the law.

b.Describe what you believe is the purpose of the law.

c. Identify what test (i.e. strict scrutiny test, intermediate test, or reasonableness test) you might use if you were a judge who was asked to determine if the law violated the equal protection clause.

d. Describe what arguments you would make, if you were a person adversely affected by the law, to persuade the judge that the law violates the equal protection clause.

e. Describe what arguments you would make, if you were the lawmaker in this case, to persuade the judge that the law does not violate the equal protection clause and that the classification is necessary to achieve the law's purpose.

f. Explain how you would rule if you were the judge who had to decide whether the law violated the equal protection clause. As judge, you should apply the appropriate test in reaching your decision.

Law #1

In an effort to reduce the number of persons under the age of 21 illegally purchasing and consuming alcoholic beverages, the state legislature passes a law requiring two distinct driver's licenses — one regular license for persons 21 or older, and a special red trimmed license issued to persons under 21 with the phrase "UNDER 21" stamped in red on the front and back of the license.

Law #2

In an effort to protect women from possible job-related injuries, Congress passes a law that includes the following: "No female federal employee will be allowed to lift more than 25 pounds at any time while on the job."

Law #3

In an effort to reduce the number of illegal aliens entering the United States from Mexico and other Central and South American countries, Congress passes a law requiring all persons of Hispanic ancestry to register with the Department of Immigration and Naturalization and receive an identification card.

Law #4

In order to protect national security and provide for the nation's defense, Congress passes a Selective Service Act requiring that all males upon reaching age 18 must register for the draft.

Law #5

In an effort to prevent fires, a city passes an ordinance requiring the owners of all laundries housed in wooden buildings within the city to get a permit from the city council. Of the 280 requests for a permit that the City Council acts on, 80 are granted and 200 are refused. All of the 200 requests that were not granted are for laundries owned by Chinese; all of the 80 laundries given the permit are owned by non-Chinese.

Law #6

In an effort to reward veterans for the sacrifice of military service, to ease the transition from military to civilian life, to encourage patriotic service, and to attract loyal and well- disciplined people to civil service occupations, a state legisla- ture passes a law that says that any qualified veteran (a person who was honorably discharged from the United States Armed Forces after at least 90 days of active service, at least one day of which was during wartime) must be considered for appointment to government civil service positions ahead of any non-veterans. Over 98% of all veterans in the state are male, only 1.8% are female.

Law #7

In an effort to reduce racial tension, provide role models for minority students, and remedy prior discrimination against minorities, a school board adopts a rule that states that if it becomes necessary to lay off teachers, those teachers with the most seniority would be retained. However, at no time would there be a greater percentage of minority personnel laid off than the percentage of minority personnel employed at the time of the layoff.

Activity 12-C

Discrimination — When Is It Legal?

Worksheet

Law # ____

a. Groups or classes:

b. Purpose:

c. Test:

d. Complainant:

e. Lawmaker:

f. Judge:

Activity 12-D

Public Schools and Equal Protection: U.S. Supreme Court Precedents

Precedents, which are previous court decisions involving similar questions, provide a major source of information used to decide cases. Court decisions on legal issues are usually written. These written decisions serve as precedents in future cases. When cases come to court, judges refer to the precedents set in earlier cases to help them decide the case before them. For example, what would a judge decide if a defendant accused of armed robbery informed the judge that he could not afford an attorney? The judge would first see if that issue had arisen in a previous case. Because the United States Supreme Court in *Gideon v. Wainwright*, 372 U.S. 335 (1963), ruled that a defendant must be provided with an attorney at the state's expense, the judge would follow that precedent.

Decisions by the United States Supreme Court set precedents for federal courts and, in some cases, state courts. On May 17, 1954 Chief Justice Earl Warren delivered the Supreme Court's decision in the landmark school desegregation case, *Brown v. Board of Education*, 347 U.S. 483 (1954). The following passage highlights this decision:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later profes- sional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.
>
> We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal education opportunities? We believe that it does.
>
> * * * *
>
> We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.

Within a year the Supreme Court issued a second opinion on this case. The second opinion, *Brown v. Board of Education*, 349 U.S. 294 (1955), established guidelines for desegregating schools. The Supreme Court said that school desegregation must occur "with all deliberate speed." The *Brown* decisions have had a profound impact on the lives of millions of children.

Who started the *Brown* case and how did the Supreme Court reach this landmark decision? The *Brown* case has deep roots. For most of our nation's history our school systems were racially segregated — black children were required to attend one set of schools, and white children were required to attend another set of schools.

State laws requiring school segregation were common throughout the nation. In the early 1950s most children in the United States attended segregated schools.

Linda Brown, an eight-year-old black student, wanted to attend the elementary school nearest her home. She could not do so, however, because the school nearest her home was for white children only. Instead, Linda Brown had to attend an elementary school 21 blocks away from her home. Linda Brown's home was in Topeka, Kansas where segregated schools for black and white children were required by law. Linda's parents filed a lawsuit claiming that their daughter was being denied the equal protection of the laws promised in the Fourteenth Amendment. The Browns argued that the law requiring segregated schools was unconstitutional. They said segregation had a harmful effect on black children because it made black children feel inferior and denied them an education equal to that of white children.

The Topeka Board of Education argued that the separate schools were equal in terms of buildings, courses of study, and quality of teachers as required by law. The school board contended that "separate but equal" schools were constitutional.

The justices of the United States Supreme Court decided the *Brown* case in 1954. The justices had to base their decision on the facts as well as on the precedents applicable to the case. **Precedents Leading to the *Brown Decision*:**

____

******* In 1896 the Supreme Court upheld a Louisiana law requiring separate but equal train cars for black and white passengers. The Supreme Court ruled that this segregation was not unreason- able and therefore not unconstitutional. This famous decision, *Plessy v. Ferguson*, 163 U.S. 537 (1896), established the doctrine that "separate-but-equal" facilities did not violate the equal protection clause.

____

******* In 1899 the Supreme Court ruled in the case of *Cumming v. Richmond County Board of Education*, 175 U.S. 528 (1899), that the federal courts had no role in deciding if the school board of Richmond County, Georgia should provide a public high school for black children. The Supreme Court acknowledged that there was no public high school for black children in Richmond County. The Supreme Court concluded, however, that education was solely a state concern. Therefore, such school-related decisions should not be determined by the Court. Thus, school boards were not required to provide high schools for black children.

____

******* In 1908 in *Berea College v. Kentucky*, 211 U.S. 45 (1908), the Supreme Court upheld a Kentucky law that prohibited private schools from teaching both black and white children at the same time, unless the classes were conducted 25 miles apart. The Supreme Court said such a law was in keeping with the "separate-but-equal" doctrine and was therefore constitutional.

____

******* In 1938 in *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), the Supreme Court decided that a Missouri law prohibiting black students from attending the University of Missouri Law School while providing no public law school for blacks was unconstitutional. The Supreme Court ruled that the law was a violation of the "equal protection of the laws" clause of the Fourteenth Amendment.

____

*** In 1950, the Supreme Court ordered the University of Texas Law School to admit black students after finding that the only public law school for blacks was inadequate. In *Sweatt v. Painter*, 339 U.S. 629 (1950), the Supreme Court said the state law school for blacks "could never hope to be equal in reputation of the faculty, experience of the administration, . . . standing in the community, tradition, and prestige." To provide "substan- tial equality in the educational opportunities offered white and Negro law students by the State," the Supreme Court ordered the University of Texas Law School to admit black law students.

*** Also in 1950, the Supreme Court, in *McLaurin v. Oklahoma State Regents for Higher Education*, 339 U.S. 637 (1950), ruled that the University of Oklahoma's requirement that black students sit and study in separate sections of the cafeteria, classrooms, and library was unconstitutional. The Court held that this form of segregation violated the black students' right to equal protection of the laws. The Court said special requirements of segregation "impair and inhibit [the black student's] ability to study, to engage in discussions and exchange of views with other students, and, in general, to learn his profession."

YOUR TURN: Precedents Change . . . But Not Overnight

1. Reread the summaries of Supreme Court cases on pages 49-51. Using the worksheet provided, individually or in small groups, make a chart of these precedents with two columns: In column 1, write the date and name of the cases; in column 2, summarize what this decision said.

Example:

U.S. Supreme Court Precedent	**Summarize What This Decision Says About Segregation as Public Policy**
1954 — Brown v. Board of Education of Topeka, Kansas	Segregated education is inherently unequal and therefore unconstitutional.

2. Briefly describe the change in Supreme Court decisions regarding schools and segregation between 1896 and 1954.

Activity 12-D

Public Schools and Equal Protection
U.S. Supreme Court Precedents

Worksheet

U.S. Supreme Court Precedents	What This Decision Says About Segregation as Public Policy
1896 — *Plessy v. Ferguson*	
1899 — *Cumming v. Richmond Board of Education*	
1908 — *Berea College v. Kentucky*	
1938 — *State of Missouri ex rel. Gaines v. Canada*	
1950 — *Sweatt v. Painter*	
1950 — *McLaurin v. Oklahoma State Regents for Higher Education*	
1954 — *Brown v. Board of Education of Topeka, Kansas*	

YOUR TURN: School Segregation — It's Not the Law, But it is a Fact of Life . . . Applying the *Brown* Precedents

Read the following case, based on Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977). Then answer the questions that follow:

Segregated public schools had been prohibited by Ohio law since 1888. But in 1954 Dayton, Ohio still operated what amounted to dual school systems, one white and one black. By 1964, a decade after the first *Brown* decision, the Dayton public school system remained basically segregated. Fifty-seven out of sixty-four schools had student populations which were 90 percent one race. Only one out of every ten students attended schools with both black and white students. By 1972 total school enrollment was decreasing and white student enrollment was decreasing even faster than black student enrollment. This resulted in even greater school segregation. Almost twenty years after the *Brown* decisions, the white and black children in Dayton continued to attend separate public schools.

In the years between 1954 and 1972, the Dayton Board of Education did not take steps to eliminate the racial segregation in the public schools. Public schools remained segregated because neighborhoods were segregated and children attended schools located in their neighborhood. Dayton school board members said children were attending segregated schools because of housing patterns, not because of any laws — blacks just lived in separate neighborhoods. During this period the school board approved construction of schools in locations that resulted in continued segregation. During the 1971-72 school year a group of black parents and students filed a lawsuit to end the racial segregation in the Dayton public schools in keeping with the precedents established by the *Brown* decisions.

Questions

1. What are the important facts in this case? Who are the important parties? Who started the court suit? What do they want the court to do?

2. What law applies to this case?

3. To what extent is the *Brown* decision precedent for this case? How is the *Brown* case similar to this case? How is it different?

4. Based on the facts and the legal precedents, if you were asked to decide whether there was illegal racial segregation in the Dayton schools, what would be your decision and why?

5. If you were asked to decide how to end segregated public schools in Dayton, what would you recommend and why?